No. 16367

IN THE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ARTHUR A. ARNHOLD, et al, *Appellants,*

vs.

UNITED STATES OF AMERICA, et al,

BRIEF OF APPELLANTS

FERGUSON & BURDELL
W. H. Ferguson,
Donald McL. Davidson,
Attorneys for Appellants.

929 Logan Building
Seattle 1, Washington

No. 16367

IN THE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ARTHUR A. ARNHOLD, et al, *Appellants,*

vs.

UNITED STATES OF AMERICA, et al,

BRIEF OF APPELLANTS

FERGUSON & BURDELL
W. H. Ferguson,
Donald McL. Davidson,
Attorneys for Appellants.

929 Logan Building
Seattle 1, Washington

TABLE OF CONTENTS

	Page
JURISDICTION	1
QUESTIONS PRESENTED	1
SPECIFICATIONS OF ERROR	2
THE RECORD	2
SUMMARY OF FACTS	2
A. The Tinder	3
B. The Spark	5
C. Initial Attack	6
D. First Breakout	12
E. Mop-up	14
F. Second Breakout	16
G. Third Breakout	17
SUMMARY OF THE ARGUMENT	20
I. Applicable Washington law found by the court	20
II. There is no rational basis in law or fact in holding that the fire-hazard condition upon the right of way did not contribute to the spread of the Heckleville spot fire	22
A. An eyewitness account of the moment of ignition is not required	22
B. Direct proof that the negligent accumulation of combustibles contributed to the spread of the Heckleville fire was uncontradicted	25
C. Ranger Floe's negligence was the proximate cause of plaintiff's damage as a matter of law	27
D. Subsequent due care does not terminate prior negligence	31
III. Wind acting upon a negligently-caused fire is not an intervening cause whether or not it reaches the proportions of an Act of God	36
A. The "Doctrine" of proximate cause	43

TABLE OF CONTENTS (Continued)

Page

IV. Under Washington law the PAW is liable for damages resulting from the fire that originated upon and escaped from its right of way found to have been negligently maintained as a fire hazard 45

V. Fibreboard's negligence and violation of statute were a substantial factor in causing plaintiffs' damages 48

A. Facts relating particularly to Fibreboard liability .. 49

B. The evidence establishes that the slash accumulated by Fibreboard upon its lands was a fire hazard in fact and negligence *per se* under applicable Washington laws 54

CONCLUSION 58

APPENDIX A—Findings of Fact and Conclusions of Law specified as error a1

APPENDIX B—Index of typewritten transcript a5

TABLE OF CASES

Page

Abrams v. Seattle & Montana Rwy. Co.,
27 Wash. 507, 68 Pac. 78 (1902) 23, 26, 46

Anderson v. McLaren, 114 Wash. 33, 194 Pac. 828 (1921) .. 44

Anderson v. Minneapolis, St. P. & S. S. M. Ry. Co.,
146 Minn. 430 179 N. W. 45 (1920) 34

Berglund v. Spokane County, 4 Wn. 2d 309,
103 P. 2d 355 (1940) 22

Blessing v. Camas Prairie Railroad Co.,
3 Wn. 2d 267, 100 P. 2d 416 (En Banc 1940) 22

Brody v. Waccamaw Lumber Co., 175 N. C. 704,
95 S. E. 483 (1918) 42

Browning v. Slenderella Systems of Seattle,
154 W. Dec. 586, 341 P. 2d 882 (1959 En Banc) 56

Burnett v. Newcomb, 126 Wash. 192,
217 Pac. 1017 (1923) 21, 35

Chicago, St. L. & P. R. Co. v. Williams,
131 Ind. 30, 30 N. E. 696 (1892) 27, 42

Conrad v. Cascade Timber Co., 166 Wash. 369,
7 P. 2d 19 (1932) 35

The Edmond J. Moran, Inc. v. The Harold Reinauer,
221 F. 2d 306 (2nd Cir. 1955) 31

Galbraith v. Wheeler-Osgood Co., 123 Wash. 229,
212 Pac. 174, 176 (1923) 21, 35, 37, 54

Great Northern Railway Co. v. Oakley,
135 Wash. 279, 237 Pac. 990 (1925) 55

Hardy v. Hines Bros. Lumber Co.,
160 N. C. 113, 75 S. E. 855 (1912) 42, 43

Haverly v. State Line & S. R. Co.,
135 Pa. St. 50, 19 A. 1013 (1890) 34

Hawkins v. Collins, 89 Neb. 140, 131 N. W. 187 (1911) 34

Hellan v. Supply Laundry Co.,
94 Wash. 683, 163 Pac. 9 (1917) 44

Insurance Co. v. Tweed, 7 Wall. 44 43

Jess v. McNamer, 42 Wn. 2d 466,
255 P. 2d 902 (En Banc 1953) 33

TABLE OF CASES (Continued)

Page

Johnson v. Kosmos Portland Cement Co., 64 F. 2d 193 (6th Cir. 1933) 31

Jordan v. Spokane, Portland & Seattle Ry. Co., 109 Wash. 476, 186 Pac. 875 (1920) 21, 46

Jordan v. Welch, 61 Wash. 569, 112 Pac. 656 (1911) 20, 37

Kuehn v. Dix, 42 Wash. 532, 85 Pac. 43 (1906) 36

Lake Erie & W. R. Co. v. Kiser, 25 Ind. App. 417, 58 N. E. 505 (1900) 34

Lehman v. Maryott & Spencer Logging Co., 108 Wash. 319, 184 Pac. 323 (1919) 21, 37

Lewis v. Scott, 154 W. Dec. 509, P. 2d ....., (1959) 43

McCann v. Chicago, Milwaukee & Puget Sound R. Co., 91 Wash. 626, 158 Pac. 243 (1916) 46

McLeod v. Grant County School District, 42 Wn. 2d 316, 255 P. 2d 360 (En Banc 1953) 22

Mensick v. Cascade Timber Co., 144 Wash. 528, 258 Pac. 323 (1927) 22, 35, 37, 41

Moore v. Rowland Lumber Co., 175 N. C. 784, 95 S. E. 175 (1918) 23

Nordstrom v. Spokane & Inland Empire R. Co., 55 Wash. 521, 525, 104 Pac. 809, 811 (En Banc 1909) 30

Pig'n Whistle Corporation v. Scenic Photo Pub. Co., 57 F. 2d 854 (CCA 9th 1932) 56, 57

Prince v. Chehalis Sav. & Loan Association, 186 Wash. 372, 58 P. 2d 290 (1936) aff'd. En Banc, 186 Wash. 377, 61 P. 2d 1374 30

Rayonier v. United States, 352 U. S. 315, 77 S. Ct. 374 (1957) 45

Robillard v. Selah-Moxee Irrigation District, 154 W. Dec. 709, ... P. 2d ..... (1959) 44

Sandberg v. Cavanaugh Timber Co., 95 Wash. 556, 164 Pac. 200 (En Banc 1917) 21, 36

The Santa Rita, 176 Fed. 890 (9th Cir. 1910) 30, 43

Schatter v. Bergen, 185 W. 375, 55 P. 2d 344 (En Banc 1936) 44

TABLE OF CASES (Continued)

Page

Seibly v. Sunnyside, 178 Wash. 632, 35 P. 2d 56 (1934) 20, 22, 44

Sheridan v. Aetna Casualty and Surety Co., 3 Wn. 2d 423, 100 P. 2d 1024 (En Banc 1940) 22

Simmons v. John L. Roper Lumber Co., 174 N. C. 220, 93 S. E. 736 (1917) 23

Sitarek v. Montgomery, 32 Wn. 2nd 794, 203 P. 2d 1062 (1949) 22

Slaton v. Chicago, Milwaukee & St. Paul Railway Co., 97 Wash. 441, 166 Pac. 644 (1917) 46

Sommer v. Yakima Motor Coach Co., 174 Wash. 638, 26 P. 2d 92 (En Banc 1933) 27, 35

Spokane International Ry. Company v. United States, 72 F. 2d 440 (CCA 9th 1934) 21, 56

St. Louis & S. F. R. Co. v. League, 71 Kan. 79, 80 Pac. 46 (1905) 34

State v. Gourly, 209 Ore. 363, 305 P. 2d 396 (En Banc 1956) 54

State of Washington v. Canyon Lum. Co., 46 Wn. 2d 701, 284 P. 2d 316 (1955) 56

Stephens v. Mutual Lumber Co., 103 Wash. 1, 173 Pac. 1031 (1918) 21, 37

Teter v. Olympia Lodge, 195 Wash. 185, 80 P. 2d 547 (1938) 22

Theurer v. Condon, 34 Wn. 2d 448, 209 P. 2d 311 (1949) 22, 35, 36, 56

Thomas v. Casey, 49 Wn. 2d 14, 297 P. 2d 614 (1956) 53

Tope v. King County, 189 Wash. 463, 65 P. 2d 1283 (1937) 22

Ulrich v. Stephens, 40 Wash. 199, 93 Pac. 206 (1908) 20

Walters v. Mason County Logging Co., 139 Wash. 265, 246 Pac. 479 (1926) 22, 37

Western Auto Supply Agency of Los Angeles v. Phelan, 104 F. 2d 85, (C. A. 9, 1939) 22

Wick v. Tacoma Eastern R. Co., 40 Wash. 408, 82 Pac. 711 (1905) 35

TABLE OF CASES (Continued)

Page

Williams v. Atlantic Coastline R. Co.,
140 N. C. 623, 53 S. E. 448, 449 (1906) 23

Wood & Iverson, Inc. v. Northwest Lum. Co.,
141 Wash. 534, 252 Pac. 98 (En Banc 1926) 35, 54

TEXTBOOKS

Page

Restatement of Torts, §§ 435, comm. b. 30

Restatement of Torts, § 437 33

Restatement of Torts, § 451 42

STATUTES

Page

RCW 76.04.220 21

RCW 76.04.370 ..... 55, 56

RCW 76.04.380 21

RCW 76.04.450 55

No. 16367

IN THE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ARTHUR A. ARNHOLD, et al, *Appellants,*

vs.

UNITED STATES OF AMERICA, et al,

BRIEF OF APPELLANTS

JURISDICTION

The District Court had jurisdiction of this action under 28 U.S.C. §§ 1331, 1332, 1346(b) and 2671-2680.

This court has jurisdiction of the appeal under 28 U.S.C. §§ 1291 and 1294(1).

QUESTIONS PRESENTED

Did negligent acts of the Government and the Port Angeles and Western Railroad (hereinafter referred to as the "PAW") in creating a fire hazard on their lands terminate when a fire that originated there was temporarily brought under control before causing damage to the plaintiffs?

Did negligent acts of the Government and the PAW in failing to take proper action to suppress and extinguish a fire at its inception and during its first days terminate when the fire was temporarily brought under control before damaging the plaintiff?

Was the creation and maintenance by Fibreboard of a large and heavy concentration of slash on its lands together with other acts and omissions in fighting the fire on its lands a negligent contributing cause to the damage caused by the Heckleville fire?

SPECIFICATIONS OF ERROR

The District Court erred in the following respects:

In making and entering Amended Finding of Fact XV that the plaintiffs had failed to show that Fibreboard was negligent by a preponderance of the evidence.

In making and etering Amended Findings of Fact and Conclusions of Law that the United States and the Railroad were not liable for the negligence found although such negligence self-evidently caused or contributed to the stipulated damages.

The particular portions of the Findings and Conclusions which are erroneous are set forth in Appendix A.

THE RECORD

Pursuant to order of the court entered on or about February 9, 1959, the appellants were granted leave to appeal upon the typed transcript of the trial proceeding in the court below. References to that portion of the record are designated by the abbreviation "Tr." An index to the witnesses and exhibits is incorporated in this brief as Appendix B. References to the printed portion of the record are designated by the abbreviation "R."

SUMMARY OF THE FACTS

Mid-day on August 6, 1951, a Port Angeles Western Railroad locomotive started seven or eight small

spot fires along its right of way in the Sol Duc district in the Olympic National Forest in Northwest Washington (R. 175). All but one of these fires were extinguished that day before they caused any material damage (R. 209-210, 184, 195). The other fire, known as the Heckelville fire, was not extinguished and "eventually grew into the conflagration which gives rise to this litigation." (R. 175.) Both the railroad and the United States were—and had been for some years—negligent in maintaining the right of way at Heckleville, which constituted a fire hazard (R. 214). The PAW refused to take any responsibility for fighting the fire (Tr. 87). The Government was negligent in attacking the fire for the first several days (R. 198), during which period it burned over 1,600 acres. On September 20, 1951, it burned over some 20 miles into the town of Forks, Washington (R. 178). On that day, homes, furnishings and businesses belonging to the individual plaintiffs and property insured by the plaintiff insurance companies was destroyed (Finding XI). It was stipulated that the value of the property destroyed was $300,261.31 (R. 173).

A. *The Tinder*

The spring and summer of 1951 were among the driest on record in the Sol Duc district. Burning conditions were severe in August of 1951 resulting from below-normal rainfall and less than usual relative humidity.

The area had been officially described as a region of extra fire hazard for over a month prior to the outbreak of the fire (Finding VIII, R. 209).

The railroad right of way was owned by the defendant United States. The Port Angeles and West-

ern Railroad Company (hereinafter sometimes called the "PAW") operated over the right of way as vendee under an executory conditional sales contract. The contract required compliance with all state and Federal fire laws and regulations and reserved to the United States the right to inspect the right of way and the right to use the right of way "for purposes not inconsistent with use thereof by PAW for railroad purposes." (R. 221, 243.) The railroad had been financially unable to comply with these restrictions and had been frequently in default on its contract payments to the United States for some years prior to August, 1951 (Tr. 22-23). For these reasons the railroad permitted its right of way to fall into a substandard and fire-hazardous condition. Weeds, trash and brush of various sizes and types grew near and between the tracks. About 25 per cent of the track ties were rotten. Discarded rotten ties had been left on the right of way in some sections within a few feet of passing trains (R. 174-175). In November of 1945, Sanford Floe, United States District Ranger, wrote the PAW requesting that it clean up its right of way, including the general area of the Heckleville fire (Tr. 41). Similar written or oral requests were made thereafter. The railroad advised Ranger Floe that it didn't have the money to comply (Tr. 45, 811). As a result, conditions gradually got worse all along the right of way. The District Ranger knew of these conditions at the time and regarded the right of way as a fire hazard, including the area in Section 30, Township 30, N.R. 10, W.W.M., the section where the Heckleville fire started (Tr. 459). Neither the Railroad nor the Ranger did anything to abate these conditions al-

though the Ranger and other government officials had frequently noted the hazardous conditions from 1936 through January 17, 1951 (Tr. 813, R. 10-11, Ex. 15, 16, 17, 18, 19, 20, 21, 22 and 23). District Ranger Floe "recognized it as a fire hazard" because "fire might get away from it." (Tr. 465.)

Both the "PAW and United States failed to use ordinary care in maintaining the railroad right of way generally, and specifically in the area of the Heckleville fire, in a reasonably fire-safe condition." (Finding XII, R. 211.) The PAW was "negligent in allowing fire hazardous conditions to exist on its right of way generally and in the particular area where the Heckleville fire started." (R. 184.)

> ". . . the United States, through the Forest Service, by direct and frequent observation of its experts particularly trained and experienced in the matter, had actual knowledge of the substandard conditions respecting fire hazard on the PAW right of way and of the fact that no remedial action was being taken or contemplated by PAW in violation of its express commitments to the United States. In these circumstances reasonable care required corrective action by the United States effective well prior to August 6, 1951 (R. 193-194).
>
> "The United States both as a landowner in the particular circumstances and by reason of the cooperative agreements, owed the duty to require or provide, through the Forest Service, proper maintenance as to fire precautions on the PAW right of way in the Heckleville area. The absence thereof . . . constituted negligence chargeable to the United States." (R. 194-195.)

B. ***The Spark***

The PAW locomotive started the fire at Heckleville at a few minutes after noon on August 6, 1951

during an eastward run from Ozette Junction (Tr. 302) to Fibreboard Camp One (also known as the Sol Duc Station) (Tr. 4333). The train crew stopped for lunch at about 11:15 at Flight (Tr. 303) discovering and putting out a small fire in an old tie beneath the train (Tr. 304). The train resumed its eastward trip at about noon, passing through the Heckleville area about five minutes after twelve (Tr. 305-306) and arrived at Fibreboard Camp One at about 12:15 (Tr. 313). Another fire had been spotted by the train crew during this run and the conductor immediately phoned Snider Ranger Station to report it and the earlier fire the train crew had extinguished (Tr. 345). He then called his superiors on the railroad. The conductor remained at the phone continuously for several hours so he could be available (Tr. 348, 352). Immediately after dropping off the conductor, the equalizer bar of the engine broke, preventing it from reversing (Tr. 307, 310) and going back immediately to the scene of the fire the train crew had sighted. Subsequently the equalizer bar was repaired, but the engine went off the rails and had to be rerailed (Tr. 315) so that it did not take any action on any of the fires until some time after 4:30 p.m. (Tr. 316). By that time the Heckleville fire had spotted out of control of the three Forest Service employees who had belatedly arrived at the scene.

C. *The Initial Attack*

At 12:30 the Forest Service lookout reported a one-eighth acre fire on the railroad right of way to District Ranger Floe at the Snider Ranger Sta-

tion. It was the first fire reported to him that day (Tr. 527) and was immediately west of the Heckleville fire.

> ". . . fire in or near heavily forested lands during a hot and dry fire season, such as occurred in the Sol Duc District from early spring until late fall, 1951, is universally recognized by foresters in Washington, and generally elsewhere, as extremely dangerous and as having a tremendous potential for damage to life and property. It is well recognized; that small fires in the forest shortly following inception may be readily controlled and suppressed by prompt and thorough action; that such fires easily and rapidly spread and rarely remain small or die out unattended without active control and extinguishment; and that forest fires by the minute are more difficult and dangerous to confine and control as they spread under conditions of wind, heat and low humidity. For these reasons, ordinary and reasonable care requires urgent speed, vigorous attack and great thoroughness in reaching and putting out fire in the forest. In the early stages of fire fighting action a few minutes delay, a man or two less than needed, and too little of the right kind of equipment may, any one of them make the difference between a small fire quickly disposed of with little or do damage and a conflagration of extensive proportions resulting in great loss of life and property." (R. 196-197.)

Heckleville is a little more than three miles from Snider Ranger Station along the Olympic Peninsula Highway. It is just over a mile from Fibreboard Camp One.

Heckleville was at the center of a 20-mile circle of timbered land, worth millions of dollars—most of which to the south and west was under the con-

trol of the Forest Service (Tr. 705). Most people in the area depend upon the timber industry for their living (Tr. 708, Finding VI, R. 208, 230). At the time the Heckleville fire was first reported to District Ranger Floe, he knew of the hazardous condition existing along the right of way and of the likelihood that any fire starting there might get away (Tr. 465). He also knew that there was a rising hill to the south of the Heckleville spot fire, that there were small saplings and tangled second growth in the area, and a large accumulation of slash above the spot where the fire started and that virgin timber extended many miles to the west and southwest from the slash (Tr. 712). Floe was charged by contract to protect lands in the area, a duty the plaintiffs knew of "and reasonably relied upon." (Finding V, R. 208.) He was "very much" concerned with what the Heckleville fire would do if it got into such inflammable material (Tr. 583). "On August 6, 1951, at and prior to the time when the Heckleville spot fire occurred, District Ranger Floe knew . . . that a fire in that area which was not extinguished might burn continuously and progressively and might burn property for many miles in any direction including westerly and southerly to the Pacific Ocean" (Am. F. IX, R. 232) including the town of Forks (Tr. 739). He knew that fire tends to grow geometrically with the time it is left unattended (Tr. 736). He knew that if fire ever got into the adjacent slash area (Tr. 697) with a strong wind behind it (Tr. 698) there was a good chance it would burn through the valleys to the west to or beyond the town of Forks, although he might have a fighting chance if the wind

were not so strong (Tr. 699). He was well aware, as was anyone with fire-fighting experience, that mid-afternoon is usually a critical time in controlling a fire because of lower humidity at that time, progressive drying of fuels by the sun and the likelihood of afternoon winds (Tr. 779).

Ranger Floe, absent any report from his assistant in the field, was aware of the fact that the Heckleville fire was spreading from the time it was reported and that it would continue to spread at an accelerated rate (Tr. 766).

No one arrived at the Heckleville fire between 12:05 p.m., August 6, 1951 when it was started, until about 2:30 p.m. when Assistant Ranger Evans arrived at the scene (Tr. 1012) with three men (Tr. 1009). At that time he radioed a report of the fire to District Ranger Floe (Tr. 1024) but did not then ask for any additional men or equipment (Tr. 1026, 1028). The fire had then spotted ahead in two places and by 3:00 was out of control (Tr. 1029, 1030, 1031). At 3:00 p.m. Mr. Evans reported the fire was out of control (Tr. 1029). He left the scene of the fire and began walking down the tracks to Fibreboard Camp One. Up to approximately 2:00 p.m. the 4-man train crew could have extinguished the fire (Tr. 537). At 2:30 p.m. ten men or less could have extinguished it (Tr. 608-609, 1038). By 3:00 p.m. it would have taken a hundred (Tr. 1041).

The Heckleville fire was reported to District Ranger Floe at 1:00 p.m. by the fire lookout at North Point. The base of the fire was observed, its location given and its size reported as one-eighth of an acre (Tr. 526-527, 734).

Prior to that time Ranger Floe had called the timekeeper at Fibreboard Camp One and asked him to tell the PAW crew to return with their engine to the fire sighted at 12:30 (Tr. 535-536, 537). He had not called any one else prior to 1:00 and for some time thereafter called no one in connection with the second reported fire. He assumed the engine would go back down the track to the first fire and its crew would automatically discover and extinguish the Heckleville fire (Tr. 866). On that account he didn't give any attention to getting any other equipment to the Heckleville fire (Tr. 536). Up to 2:00 p.m. Ranger Floe relied solely upon Firebroard's timekeeper to locate the train crew and get it moving toward the fires (Tr. 541, 828). He did nothing from the time the fire was reported until he finally learned the PAW engine was broken down, except to make fruitless calls to the timekeeper at Fibreboard Camp One (Tr. 757, 940). Either through ignorance (Tr. 535) or carelessness he did not call for the train crew on the PAW telephone at Fibreboard Camp One, although the conductor had been standing by that phone from 12:15 on and Floe was very anxious to get in touch with him. Floe could have driven to Fibreboard Camp One in ten minutes (Tr. 535). He knew men were available at Fibreboard (Tr. 721) but didn't ask them to go to the fire. In his thinking it was "just a routine fire out there for a couple of miles" (Tr. 725). He did not recall trying to get in touch with his assistant Mr. Evans and made no note of such an attempt to call him (Tr. 548). He was not in touch with Mr. Evans until about 1:45 when Evans called him (Tr. 549).

> "Through sad experience I have called for crews and told some person to tell them to go

some place, and then get unholy balled up, so I wanted to talk personally to the man that was going to the area to know if he knew where he was going to, and to understand my instructions."[1]

His first call when he did learn that the PAW locomotive was broken down was to advise the PAW's general manager that it must pay the cost of securing a substitute engine from Rayonier (Tr. 757) — a clutchfistly attitude more appropriate where lives and property are not in jeopardy.

The Heckleville fire was about thirty or forty minutes away from Ranger Floe's station by road (Tr. 575)—only three and one-half miles away on a direct line (Tr. 2915). It was within half an hour of Fibreboard Camp One (walking along the track (Tr. 1165) and half an hour away from the State fire station (Tr. 767). By 2:05 the North Point lookout reported "fire across from Heckleville going strong"—at which point Ranger Floe finally decided he needed more men (Tr. 561-562). At 2:35 he called for men from the State Fire Fighting Crew (Tr. 564). At 2:40 he called for men and equipment from Fibreboard (Tr. 565) and asked Rayonier "to roll men" (Tr. 566). At 2:47 he notified the administrative assistant to the National Forest Service re-

[1]Mr. Floe said this was the reason he did not request fire fighters from the state fire station at Tyee when he called there about 2:10 p.m. This call was merely to alert the men and to have someone stand by (Tr. 563). For something approximating an hour and a half immediately previous he had been relying upon a Fibreboard timekeeper to locate and dispatch a four-man train crew to both the first and second fires. The Government's primary expert witness, Mr. Colville (Tr. 3984, felt it was imprudent for Ranger Floe to rely upon the train crew without supervision or follow-up past 1:30 (Tr. 4146).

gional supervisor at Olympia (Tr. 567). At the time these men were ordered the fire was already spotting out of control.

By the evening of August 6, 1951 the Heckleville spot fire had covered some 60 acres. The court said:

> "After fair allowance for all of the difficulties and uncertainties confronting Floe and his subordinates and the limitations under which they were required to perform their duties, the inference clearly arises from the evidence that the Heckleville spot fire was not attacked as promptly, vigorously and continuously as ordinary care required . . ." (Mem. Dec. 23)

When it got dark on the evening of August 6, 1951, the Heckleville fire died down. All of the men on the fire were then withdrawn except for a few Rayonier men with pumps (Tr. 1183), and some PAW men whose only function was to guard some railroad bridges outside the perimeter of the fire (Tr. 131, 132, 231-232, 271-272). They did some work between 8:00 p.m. and midnight, putting out fire in the ties (Tr. 273).

D. *First Breakout*

During the evening of August 6, Ranger Floe and his assistants drew up a plan of attack upon the 60-acre fire the next day.

Some 143 men worked on the fire on August 7 (Tr. 615). A few Forest Service employees got to the fire at about 4:30 a.m. (Tr. 1074, 1467). The bulk of the men, however, did not get to the fire lines until some time after 5:30 a.m. (Tr. 615-616) and perhaps not until 6:00 or 7:00 o'clock in the morning (Tr. 616-617, Tr. 1075, 1395, 1396). It was safe to work in the woods sometime before 5:00

a.m., sunrise on August 7 (Para. IX, Pre-trial order, R. 18).

According to the Forest Service Manual,

> "Failure to attack at 4:00 o'clock a.m. violates first law of fire fighting." (Tr. 781, 2790).

a "law" Ranger Floe knew and believed should be followed if it was possible to do so (Tr. 781).

The PAW took no independent action against the fire. In fact, when the Forest Service asked the PAW on the 7th if it wanted to take over the fire, its general manager refused, saying:

> "It is on your property and I don't think it is our responsibility now." (R. 87)

On the morning of the 7th there was no wind (Tr. 1066) and it was cool (Tr. 1546). These conditions prevailed until the early afternoon (Tr. 1074, 1547). It was in fact a day much like the day before (Tr. 1475). Just as happened the day before and at the same hour (between 2:30 and 3:00 p.m.), the wind came up and the fire spotted over the incomplete fire line and went out of control (Tr. 1078).

> ". . . it became apparent that we weren't going to be able to hold the line that we had opened up. The fire was coming around both sides of it. We hadn't been able to extend it long enough, and I doubt whether we would have been able to have held it in the middle, even. There wasn't a wide enough burned out area to be safe that we would have a chance there." (Tr. 1567.)

The fire escaped first into slash on the Government's land (Tr. 3527) and then into slash on Fibreboard's land (Tr. 2011-2012).

On the 6th, the Heckleville fire grew unattended from a spot fire to several acres and then escaped three men into 60 acres. The following day it grew from 60 to 1,600 acres. The court found that District Ranger Floe and his subordinates "failed to act as promptly, vigorously and continuously as they were required to do in the exercise of ordinary care in attacking the Heckleville fire and in attempting to confine it to the 60-acre area" (Am. Finding XV, R. 234-235) and that "negligence chargeable to the United States proximately contributed to spread of the fire to the 1,600-acre area." (R. 203, Memo. Decision.) The findings do not disclose the precise basis of this finding but the evidence is overwhelming that Ranger Floe was negligent in the following particulars at least:

In failing to work on the fire during the night of August 6 (Tr. 779, 782-783);

In failing to attack at dawn on August 7 (Tr. 780, 2778);

In failing to summon enough men and equipment to get the fire under control by 10:00 a.m. on the 7th (Tr. 779, 2790).

E. *Mop-up*

By August 10, "fire lines completely encircled the 1,600-acre area and to the extent that the fire was confined within that area it was under control." (R. 198, Memo. Decision.)

From that date until September 20, 1951 when the Heckleville fire broke away for the third time, the Forest Service undertook mop-up activities in the 1,600-acre area. The railroad took no part in any mop-up activities.

> "Some traces of fire continued to erupt in various parts of the affected area, particularly in two former logging landings referred to as 'L-1' and 'L-2,' " (R. 177-178, Memo. Decision.)

The court discussed only two of the particular acts of negligence charged during the mop-up period. The court said plaintiffs had failed to show by a preponderance of the evidence that the Forest Service was negligent in not providing a night patrol on September 19-20[2] and in not anticipating the hazardous weather forecast for September 20, 1951.[3] It appears, however, that these and other allegations of negligence (Pre-trial order, Para. XXXV g, h, i, j, k, l, m, R. 51-52) were dismissed upon the basis that

> "if negligence be assumed in any particular charged, causal relationship between such negligence and the breakout and spread of the fire on the early morning of September 20 is a matter of speculation and conjecture and not shown as a reasonable probability."

These negligent acts involved little or no dispute as to the facts. In general, they involved letting known fires continue to smolder underground, particularly at an old center of logging, known as a "landing" (and sometimes referred to as "L-1" or

---

[2]Night patrols were provided and men worked without injury in tall timber, slash and steep terrain on the nights of August 7, 8 and 9 (Tr. 4173) and night fire-fighting successfully knocked down a blaze that broke out on the evening of September 13, 1954, see infra, p. 16).

[3]Mr. John Lehy, the timber sales officer at the Ranger Station (Tr. 1381) who was a division boss in the early stages of the fire (Tr. 1395), recollected that he, at least, knew that the humidity was dropping on September 19. His superiors at the time of trial could not remember their knowledge of weather conditions existing and forecast on the evening before the breakaway.

"Landing 1" herein), right on the fire line; failing to work on fire suppression during the two days it rained—rain makes smoldering fires steam or smoke so they can be located and extinguished (Tr. 3075); and in progressively abandoning mop-up after September 1, 1951 in the hope that heavy rains would complete the mop-up (Tr. 199) as Forest Service summer employees left for school (Tr. 1110).

F. *Second Breakout*

During the late mop-up period, the skeleton crew then patrolling the fire would put out any flames they saw before leaving for the night only to find others springing up in the same area afterwards (Tr. 1539-1540).

On September 13, 1951, at about 2:30 in the afternoon fire broke out near L-1 (Tr. 1108). The fire escaped into a stump in the midst of some slash outside the fire control lines (Tr. 1244-2145). A four-man suppression crew with a tank truck were on hand and extinguished that blaze. The crew came in and reported the fire out Tr. 1218) sometime between 5:00 and 6:00 o'clock (Tr. 1219-1220). That evening at about 7:30 Mr. Evans drove to Heckleville to check and saw that the fire had again broken over the fire lines in the same area (Tr. 1219, 1222). He called for a fire crew and had the second breakout under control by about 2:00 a.m. (Tr. 1223). Despite the lucky chances on September 13 that twice saved the Heckleville fire from escaping, mop-up efforts continued to decrease. No night patrol was maintained after that date and only two men worked on mop-up after the two nar-

row escapes on the 13th. The landings continued to smolder and were observed to be smoking on September 18 (Tr. 1513).

G. ***Third Breakout***

At some early hour on September 20, 1951, an east wind fanned the smoldering Heckleville fire into life. Unseen, unattended and unobserved the renewed fire grew. At about 3:15 a.m. it exploded in the classic pattern of a runaway fire. It spread first into the three quarter sections of Fibreboard slash south and west of L-1 (R. 233).

At 3:15 the State fire lookout at Gunderson Mountain—miles from Heckleville—made the first report: "The Forest Service fire was broke loose." (Tr. 1704.)

Ranger Floe was awakened at 3:45 a.m. by a phone call from Rayonier's logging camp, with a report of the fire. He could then see a glow in the sky Tr. 693).

Mr. Evans was awakened and told of the fire at 4:00 a.m. (Tr. 1114).

A passing motorist got Ted Drake out of bed to report the fire (Tr. 1513). He was third in fire command after Mr. Floe and Mr. Evans. Drake drove to Heckleville about 4:30 a.m. (Tr. 1515, 1517) and observed the flames burning "very high and very hot" (Tr. 1518) adjoining the west side of the 1,600-acre burn (Tr. 1514-1515). It was "a tremendous lot of fire" (Tr. 1515) with flames shooting up 300 feet and he "was kind of stunned by it, by the fire" (Tr. 1516-1518).

While State fire wardens, logging companies and motorists reported the breakaway to the Forest Service the blaze grew rapidly (Tr. 1628). By about 5:30 a.m. spot fires had advanced to Bigler Mountain (Tr. 1717) some four miles from the Heckleville slash (Tr. 1628) with scattered fires all in between (Tr. 950, 1719).

Mr. McDonald, District Forest Warden for the State of Washington (Tr. 1669) was an eyewitness of the Heckleville fire breakaway (Tr. 1705). He drove to within 50 feet of the fire (Tr. 1706) and within 100 feet of Landing 1 (Tr. 1714) at or shortly before 4:00 a.m. (Tr. 1708). The fire was then located around Landing 1 (Tr. 1707), the 1,600-acre area to the east not having any fire in it (Tr. 1708, 1764) nor any smoke (Tr. 1765). The fire was then burning in and around the landing (Tr. 1710, 1730) and extended west across the road into the ajacent slash area (Tr. 1707). There was solid fire from the landing to the west as far as he could drive or see (Tr. 1712). There was "really a wall of fire" (Tr. 1715).

At about the same time as Mr. McDonald was at the fire (Tr. 654) Ranger Floe observed fire burning in the three quarter-sections of slash immediately west of Landing 1 (Tr. 654). He was then about three miles away from the fire, near the Ranger Station (Tr. 695) but was familiar enough with the area to locate the area then burning (Tr. 655). Instead of burning with a reddish cast the "material was burning whiter than I have ever seen anything before," which meant it was burning "with intense heat" (Tr. 4542).

Mr. Walker and Mr. Cunningham, camp foreman (Tr. 1845) and logging superintendent for Rayonier (Tr. 1878) drove to Heckleville at about 4:00 a.m. They observed lots of fire on the hill (Tr. 1859). It was racing up the hill toward unburned timber visible over the flames (Tr. 1904).

The State fire warden was in charge of fighting the fire at Forks. By 7:00 a.m. the school superintendent called off school and warned school buses to stay out of town. Loggers were told to get out of the woods (Tr. 1720-1721). By 9:30 a.m. the Heckleville fire was about a quarter of a mile from the town, advancing slowly from the east along a mile and a half front (Tr. 1722-1723).

Early in the morning the streets of the town were covered with ashes and at noon it was dark as night from the pall of smoke (Tr. 1723). The fire burned some 20 buildings, timber, bridges, machinery—everything in its path. A large prairie east of town in the path of the flames was the only thing that saved the entire town from destruction. The fire continued to burn for three days until the rain came and stopped it (Tr. 1724-1725).

The Heckleville fire had realized its "tremendous potential for damage to life and property" (R. 197). The Heckleville fire—born and nurtured in negligence—had done the damage "universally recognized by foresters in Washington" (R. 197). The Forest Service believes that:

> "To have a fire that has been controlled and apparently mopped up start anew, hours, days, weeks later, can only be classed as someone's inexcusable failure" (Tr. 785, Ex. 151, p. 38).

SUMMARY OF THE ARGUMENT

The court correctly found the law of the State of Washington applicable to the duties of landowners and others respecting fire fighting (with the exception of liability for slash). The court correctly found that an Act of God acting upon a condition previously created through negligence or concurrently with negligence does not relieve the negligent actor (R. 180, 201).

Having determined that defendants were negligent in creating and maintaining a fire hazard at Heckleville and in failing to attack and extinguish the fire, the court had no foundation in fact, law or logic in dismissing the action against the Government or PAW.

Fibreboard was negligent in maintaining fire hazardous slash upon its premises.

I. *Applicable Washington law found by the court.*

> "The owner or occupant of land in or near a forest area who with due care starts fire on such land for a lawful purpose, such as land clearing, must exercise ordinary and reasonable care to prevent spread of the fire to the damage of others. Failure to perform such duty is negligence rendering the party guilty thereof liable for all damage proximately resulting therefrom. * * *" (R. 178).
>
> "The owner or occupant of forest land who, regardless of purpose, negligently starts a fire on such land which, with or without his further negligence, spreads to damage others is liable for all damage proximately caused by such fire." *Ulrich v. Stephens,* 48 Wash. 199, 93 Pac. 206 1908); *Jordan v. Welch,* 61 Wash. 569, 112 Pac. 656 (1911); *Seibly v. Sunnyside,* 178 Wash. 35

P. 2d 56 (1934) [see R.C.W. 76.04.220 and *Spokane International Railway Co. v. United States,* C.A. 9 (1934), 72 F. 2d 440, attaching civil liability to violation of the standard of care established by criminal statute] (R. 179).

"An owner or occupant of forest land with knowledge of a fire burning on such land, even though started by strangers, must exercise ordinary and reasonable care to prevent spread of the fire to the damage of others. Failure to do so is negligence rendering the landowner or occupant liable for all damage proximately resulting therefrom." *Sandberg v. Cavanaugh Timber Co., supra; Jordan v. Spokane, Portland & Seattle R. Co.,* 109 Wash. 476, 186 Pac. 875 (1920); *Galbraith v. Wheeler-Osgood Co., supra;* and see R.C.W. 76.04.380 (R. 179).

"All damages of a kind reasonably foreseeable as a consequence of the failure to exercise reasonable care for the restraint and suppression of a fire may be recovered against the negligent party. To constitute an intervening independent cause as a break in the chain of proximate causation precluding recovery against a negligent defendant, Acts of God or negligence of others must be the sole proximate cause of the damage complained of. The burden of going forward with evidence sufficient to sustain a finding of intervening, independent, proximate cause rests on the party asserting it. If negligence of a defendant in starting or in failing to confine or suppress a fire combines and concurs with the negligence of others or with Acts of God to proximately cause damage to third parties, such defendant is liable for the whole of the damage so caused." *Stephens v. Mutual Lumber Co.,* 103 Wash. 1, 173 Pac. 1031 (1918); *Lehman v. Maryott & Spencer Logging Co., supra; Galbraith v. Wheeler-Osgood Co., supra; Burnett v. Newcomb, supra; Walters v. Mason*

County Logging Co., 1939 Wash. 265, 256 Pac. 749 (1926); *Mensick v. Cascade Timber Co., supra; Seibly v. Sunnyside, supra; Tope v. King County,* 189 Wash. 463, 65 P. 2nd 1283 (1937); *Teter v. Olympia Lodge,* 195 Wash. 185, 80 P. 2d 547 (1958); *Blessing v. Camas Prairie Railroad Co.,* 3 Wn. 2d 267, 100 P. 2d 416 (En Binc 1940); *Berglund v. Spokane County,* 4 Wn. 2d 309, 103 P. 2d 355 (1940); *Sitarek v. Montgomery,* 32 Wn. 2d 794, 203 P. 2d 1062 (1949); *Theurer v. Condon,* 34 Wn. 2d 448, 209 P. 2d 311 (1949); *McLeod v. Grant County School District,* 42 Wn. 2d 316, 255 P. 2d 360 (En Banc 1953) (R. 179-180).

"One who by contract assumes a pre-existing duty of another to provide fire protection and furnish firefighting service is liable to third parties relying on prudent performance of such duties for damage proximately caused by failure to exercise reasonable care in the performance of the assumed duties. In such situation a disclaimer of liability between non-governmental contracting parties will not bar recovery by the third party for damage resulting from negligent performance of the assumed duties." *Sheridan v. Aetna Casualty and Surety Co.,* 3 Wn. 2d 423, 100 P. 2d 1024 (En Banc) (1940); *Western Auto Supply Agency of Los Angeles v. Phelan* (C.A. 9 (1939), 104 F. 2d 85. (R. 180-181).

II. ***There is no rational basis in law or fact in holding that the fire-hazardous condition upon the right of way did not contribute to the spread of the Heckleville spot fire.***

A. ***An eyewitness account of the moment of ignition is not required.***

". . . the court has found PAW negligent in allowing a fire-hazardous condition to exist on

its right of way generally and in the particular area where the Heckleville fire started" (R. 184).

Two sentences later, the court said:

> ". . . It simply cannot be determined from the evidence with any degree of certainty or with reasonable probability and without inference on inference where, how or why the fire ignited, nor whether any excess of combustible material on the right of way was actually at the initial point of the fire" (R. 184-185).

The Heckleville fire was burning along the railroad track some 300 feet when first observed.

One man with a back pack can easily put out a small fire, which is why back pack cans are required at slash burning fires (Tr. 2115). Indeed, common sense alone dictates that you can snuff out a match (Tr. 2778-2779). "Even an ordinary person would know that if he sees a fire start, if he drops a match in the woods, that the important thing is to stamp it out, to act quickly" (Tr. 2981).

The court itself commented that there was no need of expert testimony to prove that "if a fire is so small three or four fellows can get over and put it out" (Tr. 2364).

> "No one testified that he saw the sparks fall from the engine upon the right of way. It is rarely that this can be shown by eyewitnesses, for it would usually happen that if the sparks were seen at the moment of falling and igniting the stubble, the fire would be put out by the observer." *Williams v. Atlantic Coastline R. Co.,* 140 N.C. 623, 53 S.E. 448, 449 (1906); Accord *Abrams v. Seattle & Montana R. Co.,* 27 Wash. 507, 512, 68 Pac. 78, 79 (1902); *Simmons v. John L. Roper Lumber Co.,* 174 N.C. 220, 93

S.E. 736 (1917); *Moore v. Rowland Lumber Co.*, 175 N.C. 784, 95 S.E. 175 (1918).

Had a jury been instructed that the plaintiff must prove by direct eyewitness testimony precisely "where, how or why the fire ignited" and that an "excess of combustible material on the right of way was actually at the initial point of the fire" it would have been clear error. Had a trial court refused to permit a jury to find that negligently accumulated combustibles upon the right of way caused or contributed to the ignition of the fire upon the right of way, because it "cannot be determined from the evidence with any degree of certainty" in the absence of eyewitness proof it would have been clear error. There is no authority anywhere for imposing such a burden upon a plaintiff. Its application would of necessity defeat any recovery for fire damage. Such an observer's failure to exercise slight care might justly be viewed as the primary cause of the fire's escape, bordering upon criminal negligence.

The ludicrous result obtains that upon the issue of duty of the defendant the court found "a fire hazardous condition to exist . . . in the particular area where the Heckleville fire started" (R. 184) and two sentences later found that it would require "inference on inference" to determine whether or not "any excess of combustible material on the right of way was actually at the initial point of the fire" (R. 184). This logic chopping rested upon no facts in the record and was directly contrary to the court's own belief that

> "I recognized in thinking about it . . . that a poorly-kept right of way would, of course, be more likely to contribute to starting the fire . . ." (R. 268).

B. *Direct proof that the negligent accumulation of combustibles contributed to the spread of the Heckleville fire was uncontradicted.*

The trial court, concluding that direct proof of the place of initial igniting of the Heckleville fire was lacking, summarily applied the same conclusion to the cause of its subsequent spread. There was direct, unequivocal and uncontradicted evidence that the negligently accumulated combustibles contributed to the spread of the fire.

When first seen, the fire was burning on the ground in stumps, downed logs and "ordinary litter that accumulates over a period of years." Material burning within the rails and for ten feet on either side was the same, except that there was no stump that close. The fire had started within a slight cut and burned over "grass and the same type of vegetation and dead brush that accumulates over a period of years." The ties on the railroad grade were on fire (Tr. 1013, 1665). Ties were so decayed they splintered at a kick and there were stumps 20 to 30 feet way from the ties (Tr. 1013). Old ties were scattered along the roadbed (Tr. 1148). Of the five fires Mr. Evans saw on August 6, the Heckleville fire had the most inflammable debris around it, was the driest and was most susceptible to burning (Tr. 1150).

At 3:30 the ties were seen flaming in the right of way (Tr. 1665). Mr. LeGear, vice-president and general manager of PAW (Tr. 13), arrived at the fire at about 5:30 on the afternoon of August 6, 1951 (Tr. 191). He testified that the fire was then burning in the brush and ties in the tracks and in ties piled alongeside the tracks, the grass having already burned off (Tr. 192).

If sparks fall into rotten ties "there is a very strong chance of such sparks . . . starting smolders which under the pressure of a little air movement will burst into flames" (Tr. 2340). On the other hand:

> "You might sit and throw cigarettes into a bunch of pine needles all day and not be able to start a fire, but you throw that cigarette on some punky wood and chances are a hundred to one it will burn" (Tr. 3074).

Among all fuels "rotten ties rank as a number one tinder box. As a matter of fact, the early pioneers used to use rotten wood to catch a spark with their flints, it is such an excellent source of tinder" (Tr. 2698).

There are not differing requirements of proof of negligence and proof of proximate cause. One does not rest upon an inference that the court is compelled to draw and the other require inference upon inference. The same proof supports both equally.

> "The respondent was not obligated to prove these facts by the direct evidence of an eye witness." *Abrams v. Seattle & Montana R. Co.*, 27 Wash. 507, 512, 68 Pac. 78, 79 (1902).

Only if it can be said that the origin and spread of the fire in the right of way was "equally, or else with reasonable certainty, attributable to other probable causes" were plaintiffs required to exclude such other causes (174 Wash. at p. 648). Even so, plaintiffs were not required "to meet conjecture or mere possibilities with proof to the contrary, for if such were the rule "there could hardly ever be a case where negligence and consequent liability could be established by circumstantial evidence for it would be easy to advance some theory not wholly

barren of reason but which in the very nature of things it would be impossible to meet with proof." *Sommer v. Yakima Motor Coach Co.,* 174 Wash. 638, 645, 26 P. 2d 92, 195 (En Banc 1953).

The same fact that compelled a finding of negligence in the maintenance of the fire hazardous right of way compells a findings that the litter contributed to the spread of the fire.

> "It might reasonably be inferred that [the fire] was communicated to the weeds and grass on the right of way because of Appellant's negligence in allowing such an accumulation of combustible matter in such close proximity to the line of its tracks and that it escaped from the right of way because of the same act of negligence." *Chicago, St. L. & P. R. Co. v. Williams,* 13 Ind. 30, 30 N.E. 696, 697 (1892).

C. ***Ranger Floe's negligence was the proximate cause of plaintiff's damage as a matter of law. (1) Having actually realized that the accumulation of debris at Heckleville might cause a forest fire encompassing plaintiff's property, and (2) knowing that the failure to take diligent action on the Heckleville fire would have the same result.***

The consequenceless negligence found by the court below contains within itself a fundamental error of law. Its plausibility rests only upon superficial juggling of concepts.

Defendants were found negligent in two respects:

1. In maintaining the right of way as a fire hazard; and

2. In failing to take proper action against the inevitable fire when it occurred.

What consequence is the hypothetical reasonable man charged with anticipating or foreseeing as a result of these negligent acts?

The first act of negligence could only result in the ignition and spread of fire. If this is not the consequence a reasonable man should foresee then there is no negligence.

The second failure—negligence in combatting the negligently existing fire—could only result in the continued existence and spread of the fire. If this was not the consequence to be expected by a reasonable man there is simply no negligence.

The negligence consisted of creating an unreasonable risk of a fire occurring and escaping to the damage of the plaintiffs. That risk existed before the fire started and it never terminated. The court repeatedly so characterized the risks.

> ". . . in the heavily forested state of Washington where there is great hazard of vast injury and damage from forest fire, the State law places upon an owner of land either containing timber or in the immediate vicinity of timber lands, the duty to exercise reasonable care concerning maintenance of his premises as to fire precautions . . ." (R. 193).

> "fire in or near heavily forested lands during a hot and dry fire season, such as occurred in the Soleduc District from early spring until late fall 1951, is universally recognized by foresters in Washington, and generally elsewhere, as extremely dangerous and as having a tremendous potential for damage to life and property" (R. 196-197).

> "In the early stages of firefighting action a few minutes' delay, a man or two less than

needed, and too little of the right kind of equipment may, any one of them, make the difference between a small fire quickly disposed of with little or no damage and a conflagration of extensive proportions resulting in great loss of life and property" (R. 197).

". . . a poorly kept right of way would, of course, be more likely to contribute to starting the fire or its spread afterwards" (R. 268).

"negligence chargeable to the United States proximately contributed to spread of the fire to the 1,600-acre area" (R. 203).

"If there were no fire in the 1,600-acre area . . . fire could not have escaped from it . . ." Nobody is suggesting that plaintiffs' damage came from any other source . . . (R. 259).

These findings were, of course, compelled by the facts of the particular case. Ranger Floe was well aware of them, both as general principles and as specifically applicable to the Hecklevile fire.

By 2:05 p.m. on August 6, 1951 District Ranger Floe was "very much" concerned with the explosive potential of the Heckleville fire (Tr. 583-4). He then expected the fire to travel into an area of downed timber "laying on the ground just like jackstraws" (Tr. 582).

For some years he had recognized that the combustible litter along the right of way (Tr. 456-458) in Section 30 (where the fire started) was a fire hazard (Tr. 459) and he was afraid of it because "Fire might get away from it" (Tr. 465). At all times up to September 20, 1959 Ranger Floe knew of the huge accumulation of inflammable debris adjacent to the fire lines. He and the State Forester "both knew that the fire was going down this valley

and the fuel in there would put it into Forks or beyond Forks" if there was a strong east wind (Tr. 697).

> "Knowledge of danger is in law knowledge of the injurious results naturally and proximately flowing from that danger." *Nordstrom v. Spokane & Inland Empire R. Co.,* 55 Wash. 521, 525, 104 Pac. 809, 811 (En Banc 1909).

Under the state of facts found by the court and the finding of negligence before, at and after the inception of the Heckleville fire there can be no question of causation.

> ". . . if the actor should have realized that his conduct might cause harm to another in substantially the manner in which it is brought about, the harm is universally regarded as the legal consequence of the actor's negligence (Rest. of Torts, § 435, comm. b).

This court has applied that concept in reversing a trial court for discharging a defendant of liability for lack of proof of the proximate cause of the ignition of a fire while simultaneously finding that the defendant had negligently created the fire hazard.

> "The injury flowed directly from the negligent act. The result of the act is not incompatible with what one would expect. The question is not whether such an act would produce a conflagration in the majority of cases, but whether it has a decided and natural tendency to produce such a result." *The Santa Rita,* 176 Fed. 890, 895 (9th Cir. 1910).[4]

Prince v. Chehalis Sav. & Loan Ass'n., 186 Wash. 372, 58 P. 2d 290 (1936), aff'd En Banc, 186 Wash.

---

[4]The Honorable William Denman, of this court, was the attorney for the successful appellant.

377, 61 P. 2d 1374, adopted this universal rule in holding a defendant liable for the negligent creation of a fire hazard with knowledge of its danger to nearby property if fire should occur in it. Liability for creating such a hazard is not increased nor diminished by the fact that there is no proof of cause or precise place of the origin of the fire. *Ipso facto,* a plaintiff has no burden to prove that the fire arose at a particular point where combustibles were negligently accumulated nor does he lose his rights by showing the actual cause of the fire—whether accidental or the negligent act of another.

In *Johnson v. Kosmos Portland Cement Co.,* 64 F. 2d 193, 195 (6th Cir. 1933) the trial court had found that the defendant was negligent in creating a hazardous explosive condition but that such negligence was not the proximate cause of the explosion because it was touched off by lightning. The anomalous posture of the findings led the appeal court to reverse. It said, as must be said here:

> "It must be clear that the finding [of lack of proximate cause] is at least a mixed finding of law and fact, as to which no presumption of correctness obtains."

In a similar situation the Second Circuit bypassed attractive but sterile concept juggling — merely holding that

> "liability for the ensuing damage is clear, even if there is no proof of what ignited the [oil] slick." *The Edmond J. Moran, Inc. v. The Harold Remover,* 221 F. 2d 306, 208 (2nd Cir. 1955).

D. ***Subsequent due care does not terminate prior negligence.***

The trial court, finding no basis in the record for termination of the negligence short of liability, was forced into a legally erroneous application of the doctrine of proximate cause.

It is possible to argue that the court was led to this conclusion by fragmentizing the fire into its progress in time and space—a rule wholly contrary to the cases, texts and facts elsewhere found.

There was but one fire. It "originally started at a point on the right of way in Section 30 almost due south of a settlement known as Heckleville. This particular spot fire eventually grew into the conflagration which gives rise to this litigation . . ." (R. 175). It was largely brought under control within a 1,600-acre tract by August 10, 1951, but "continued to erupt . . . until the night of September 19-20" (R. 177-178). When a fire burns over 1,600 acres "it is a practical impossibility" to extinguish all smoldering fires (R. 198) although smaller fires can be completely extinguished, as were the six or seven other fires started by the PAW on August 6, 1951. On the night of September 19-20, 1951, a wind fanned these smoldering embers to life, carried them across the fire lines into the Fibreboard slash to the west[5]—from which it spread to Forks (R. 178).

It is clear from the findings that the negligence of defendants continued up to August 10, 1951, at least. What terminated it? Under the law neither temporary suppression of the fire, subsequent due care, lapse of time, nor an Act of God acting upon the negligently existing fire would terminate the negligence.

---

[5]This happened twice previously on September 13, 1951 but fortunately, during the day and early evening.

1. Subsequent due care does not terminate negligence.

> **"If the actor's negligent conduct is a substantial factor in bringing about harm to another, the fact that after the risk has been created by his negligence the actor has exercised reasonable care to prevent it from taking effect in harm does not prevent him from being liable for the harm (Rest. Torts, § 437).**

Illustration:

> "The X Railroad Company during a period of drought negligently sets fire to some underbrush and tree stumps on its right of way. Realizing the danger that the fire might spread to the adjacent timber land of B, the X Company orders its trackmen to put out the fire. They attempt to do so and reasonably believe that they have succeeded. A high wind not unusual in that locality at the time of the year springs up during the night. Some embers hidden in one of the stumps are fanned into flame, which spreads to B's land and consumes valuable timber. The X Company is liable for the destruction of B's timber."
>
> See *Jess v. McNamer,* 42 Wn. 2d 466, 255 P. 2d 902 (En Banc 1953).

It is clear that plaintiffs would have recovered if their homes had been destroyed on August 10, 1951, assuming the fire had not been temporarily brought under control on that date. It would also seem clear that if the two breakouts of September 13 had not luckily been contained, plaintiff's property would likewise have been destroyed—and there would be no basis in the findings to deny recovery.

> "The defendant's duty to exercise reasonable prudence to control the fire until it was extinguished or rendered harmless to his neighbor

was a continuing duty which was not discharged so long as the fire existed." *Hawkins v. Collins,* 89 Neb. 140, 131 N.W. 187 (1911).

"The sequence from the original fire to the burning of plaintiff's logs was interrupted by two apparent cessations of the fire, but the jury has found [as here the court has found] that the cessations were only apparent, leaving intervals of time in the visible progress of the fire, but making no real break at all in the actual connection." *Haverly v. State Line & S. R. Co.,* 135 Pa. St. 50, 19 A. 1013, 1014 (1890).

"There was but one fire—a fire which continued to burn until all the property was destroyed. It was arrested, but not extinguished. The fact that it was stayed for a time was not a new and independent cause. It was not an intervening agency, disconnected from the original negligence of the company. * * * The arrest of the flames for a time, however, did not start a new fire, nor furnish a new cause or force which destroyed the . . . property. It operated rather to diminish the destructive force of a fire which had been negligently started, and which had never been extinguished. There was continuity in the fire, and the fact that it should be partially subdued, and then fanned up and carried along by the wind, are not outside of the bounds of reasonable anticipation." *St. Louis & S. F. R. Co. v. League,* 71 Kan. 79, 80 Pac. 46, 47 (1905).

The danger of a fire spreading

"was the danger that appellant was bound to contemplate, to-wit: the natural and probable consequences of the original act, not the effect of the supposed extinguishment of the fire subsequently." *Lake Erie & W. R. Co. v. Kiser,* 25 Ind. App. 417, 58 N.E. 505, 507 (1900); *Anderson v. Minneapolis, St. & S. S. M. Ry. Co.,* 146 Minn. 430, 179 N.W. 45 (1920).

Where the negligence consists of the creating or maintenance of a fire hazard—fire damage thereby being foreseeable—it does not matter whether the damage is immediate or remote in determining proximate cause, *Theurer v. Condon,* 34 Wn. 2d 448, 461, 209 P.2d 311, 318 (1949).

Temporary suppression of a fire and communication of the fire after a lapse of time is insufficient under Washington law to break a chain of causations or to terminate negligence. *Wick v. Tacoma Eastern R. Co.,* 40 Wash. 408, 82 Pac. 711 (1905).

Burnett v. Newcomb, 126 Wash. 192, 217 Pac 1017 (1923) (fire thought to be extinguished on July 18, 1922, the day before wind fanned it to life).

Wood & Iverson, Inc. v. Northwest Lum. Co., 141 Wash. 534, 252 Pac. 98 (En Banc, 1927), (fire jumped over two miles and was burning in six places within 15 minutes on September 30, 1923).

Gailbraith v. Wheeler-Osgood Co., 123 Wash. 229, 212 Pac. 174 (1923), (slash fire believed by Fire Wardens to be in a safe condition).

Sommer v. Yakima Motor Coach Co., 174 Wash. 638, 26 P. 2d 92 (En Banc 1933) (fire extinguished several times).

Mensick v. Cascade Timber Co., 144 Wash. 528, 258 Pac. 323 (1927), (fire started September 18, 1924 and burned plaintiff's property on September 21, 1924 when wind velocities were recorded at 44 miles per hour).

Conrad v. Cascade Timber Co., 166 Wash. 369, 7 P. 2d 20 (1932) (fire went six miles in 24 hours).

Kuehn v. Dix, 42 Wash. 532, 85 Pac. 43 (1906), (damage on October 3, 1904 when a heavy wind spread a fire started a month before).

Sandberg v. Cavanaugh Timber Co., 95 Wash. 556, 164 Pac. 200 (En Blac 1917), (fire travelled about two miles over a three-day period).

Theurer v. Condon, 34 Wn. 2d 448, 460, 209 P. 2d 311 (1949), (fire occurred several years after creation of the fire hazard).

III. ***Wind acting upon a negligently-caused fire is not an intervening cause whether or not it reaches the proportions of an Act of God.***

In his opinion the court found it unnecessary to discuss the question of whether or not the wind that arose was "an Act of God as that term is meant in law" (R. 281), since he had already found that the pre-existing negligence had caused nothing. In Finding XVII, however, the court coupled with that finding the statement that:

> "The sole proximate cause of the damages to plaintiffs in the amounts stipulated herein was the unforeseeable and fortuitous combination of wind and weather conditions occurring on September 20, 1951."[6]

All parties agree that the Heckleville fire was burning and smoldering on the night of September 19-20. All parties agree that a wind that night caused it to flare up and cross the fire lines as it had twice done six days earlier. All parties agree

[6]This falls far short of a finding that the weather conditions were extraordinary or unusual. In a large measure, wind and weather conditions at any particular time and place are always "fortuitous," and trained meteorologists forsee only a range of such conditions applicable over a wide area.

that the wind on the night of September 19-20, 1951, did not start any fire, but at most fanned it into renewed activity. The court refused to enter plaintiffs' proposed finding:

> "But for the fire which existed in the 1,600-acre area from August 10 to September 20, the fire would not have broken away on September 20 and plaintiff would not have suffered the stipulated damages to its property" (R. 220).

The only reason was that such facts were "so self-evident" that it would be "silly to make such a formal finding" (R. 258).

Wind causing a fire to spread does not ever appear to have been deemed an intervening cause in the Washington timber fire cases. It has been referred to in several instances, but in each case it was found that no antecedent negligence of the defendant had caused or contributed to the origin, spread or existence of the fire.

> ". . . all of the parties . . . did everything possible to extinguish or supress the spread of the fire from the time it was discovered . . ." *Walters v. Mason County Logging Co.,* 139 Wash. 265, 246 Pac. 749, 751 (1926).
>
> "There is no evidence to justify a finding of negligence on the part of the appellant." *Lehman v. Maryott & Spencer Logging Co.,* 108 Wash. 319, 322, 184 Pac. 323, 324 (1919).
>
> "He alleges that appellant . . . negligently and carelessly permitted the fire to escape from the immediate vicinity of the engine. The testimony wholly failed in these particulars." *Stephens v. Mutual Lumber Co.,* 103 Wash. 1, 8, 173 Pac. 1031 (1918).[7]

[7]In *Galbraith v. Wheeler-Osgood Co.,* 123 Wash. 229, 235, 212 Pac. 174, 176 (1923) the court pointed out that these cases merely held "that there was therein no evidence on which to base a finding of negligence." Repeated in *Mensik v. Cascade Timber Co.,* 144 Wash. 528, 258 Pac. 323 (1927).

The court found that negligence of the United States in the management of its lands and in failing to confine and suppress the fire proximately caused it to spread to the 1,600-acre area (R. 203). Hence its very existence on September 19-20 was the result of negligence. The wind was not found to have been an intervening Act of God and the court specifically held that it was unnecessary to decide that point (R. 180, 201, 281). The formal finding made thereafter that the wind was the sole proximate cause adds nothing except a verbal symmetry to the decision. It merely fills the void left when the court decided that the negligent occurrence, spread and existence of the fire had no consequences. The formal characterization of the wind as the "sole proximate cause" represents at best an unnecessary and legally irrelevant conclusion. For this reason, Appellant does not deem it necessary to argue at any length the merits of the court's conclusion that there was an "unforeseeable and fortuitous combination of wind and weather conditions."

Suffice it to say that the admitted facts and evidence clearly refute any claim that wind and weather conditions were unforeseeable in the sense that the danger of the fire coming to life as a result could not have been expected.

Like east winds and weather conditions concurred six days before and twice caused the fire to jump the fire lines.

Ranger Floe believed that a "wind at ten miles an hour could blow sparks out of the area" (Tr. 693) and that a 12- to 15-mile wind would carry sparks for a thousand feet (Tr. 742).

No weather station in the immediate area of the Heckleville fire, or anywhere else, recorded any wind or burning condition in excess of that forecast or significantly different from what had existed during the preceding several weeks or months (Tr. 2164-66, 2166, 2168, 2169, 2170). Equally or more severe easterly winds and low humidity had been recorded many times previously at nearby weather stations (Tr. 2175).

Six of the seven wind readings taken at the three Sol Duc valley weather reporting stations on September 20, 1951 were below the 16 miles per hour forecast (Tr. 2206-7).

The winds recorded on September 19 and 20, 1951 at the only nearby weather station having a long history of reports had been exceeded 54 times in previous years (Tr. 2218).

Weather recorded at Beaver would be the most representative of the wind at the fire area (Tr. 4183) and the maximum wind recorded there was 16 miles per hour on September 19-20 (Tr. 4184).

There was no wind recorded anywhere in excess of 25 miles an hour — winds Mr. Floe thought "would be more unusual but they could occur" (Tr. 716) during August and September in the Sol Duc Valley (Tr. 715).

Mr. Floe couldn't estimate the actual speed of the wind when he arose as 4:00 a.m. on the morning of September 20, but thought it "was *one* of the strongest winds" he had ever seen.

The Timber Sales Officer who had been stationed at Snider Ranger Station for 15 years (Tr. 1381) felt that there would be nothing unusual about

winds between 30 and 40 miles per hour in August and September (Tr. 1427).

Mr. Drake, fire suppression crew foreman at Snider Ranger Station (Tr. 1364) at first made no estimate of the speed of the wind when he observed the Heckleville fire from the road at 4:30 a.m. on Septemebr 20. He could only describe the wind as "fairly strong" (Tr. 1518). Subsequently he testified that in his opinion some gusts of wind might have reached as high as 25 to 30 miles per hour (Tr. 1626).

Others estimated the wind on the morning of September 20 at 10 miles per hour (Tr. 1666).

Any moderate wind would have blown a spark into the slash area. Once the slash was fired the fire would have gone in the direction of the wind. If the wind was as high as 25 miles per hour it would have only made the fire move a little faster but not have altered the final result (Tr. 2392-93).

At about 7:00 a.m. at a point ten miles from Heckleville (Tr. 3213) when the fire was in sight (Tr. 3211) on the top of an exposed ridge there was a wind estimated at 35 to 40 miles per hour (Tr. 3215). Some part of this wind at least was due to the heat of the fire (Tr. 3232) which would have created a draft up the ridge (Tr. 3228). The same witness had previously seen 35- to 40-mile-per-hour winds on the Olympic Peninsula in October (Tr. 3235) and would expect 20- to 25-mile-per-hour winds in August and September with occasional winds even stronger (Tr. 3237).

A State fire warden stationed at Gunderson Mountain testified by interrogatory that he esti-

mated the wind at his station at about 4:00 a.m. at 40 miles per hour (Tr. 3291). His boss said that he had no experience or training in wind measurement (Tr. 1727), a fact the witness confirmed (Tr. 3290) together with acknowledging that he was prejudiced against the plaintiff (Tr. 3292).

Another defense witness testified that winds were probably 25 miles per hour at elevations higher than Beaver (Tr. 4416) and were 10 or 16 miles per hour at low elevations (Tr. 4419).

Fibreboard's manager estimated the wind speed at the Heckleville fire on the morning of September 20 at 25 miles per hour (Tr. 4439) at an elevation of 2450 feet (Tr. 4475). A companion estimated the wind at 30 to 35 miles per hour at the same time and place (Tr. 4498). At that time there was fire burning right in front of them which was creating a certain amount of the wind (Tr. 4523).

In short, there was no evidence by anyone that the wind actually measured or observed was beyond the realm of expectation or even highly unusual at the time and place it occurred. Even then, the weather conditions at most merely accelerated the progress of the fire to Forks.

> "There is also testimony which accords with common knowledge, that fires themselves create a wind which increases as the fires increase; and that hills and draws act much the same as smoke stacks giving draft to the fire and velocity to the wind." *Mensik v. Cascade Timber Co.,* 144 Wash. 528, 534, 258 Pac. 323, 325-326 (1927).

Under the Restatement of Torts, such wind could not avoid liability.

> **An "intervening operation of a force of nature without which the other's harm would not have resulted from the actor's negligent conduct prevents the actor from being liable for the harm, if**
>
> **"(a) the operation of the force of nature is extraordinary, and**
>
> **"(b) the harm resulting from it is of a kind different from that, the liklelihood of which made the actor's conduct negligent." (§ 451).**

The court said:

> ". . . if the PAW engine had been defective and had negligently loosed the fire, or if the Forest Service in some manner had negligently loosed the fire in the first instance, I am quite well satisfied that the ultimate damage resulting to the plaintiffs in the case might be thought to be causally related to that original negligence" (R. 281).

Here then, is the nicest point of distinction. If the PAW had properly maintained its right of way, but through some malfunction of its engine started the Heckleville fire it would be liable. Where its negligence consisted of laying the tinder over a period of years and the spark was accidental, it is not liable. The course of events is the same. The foreseeable result is the same. The forest fuels were the same, the wind and weather conditions were unchanged, and the damage was identical. As a matter of law there is no distinction arising out of these two kinds of negligence. *Brady v. Waccamaw Lumber Co.,* 175 N.C. 704, 95 S.E. 483 (1918); *Chicago, St. L. & P. R. Co. v. Williams,* 131 Ind. 30, 30 N.E. 696 (1892); *Hardy v. Hines Bros Timber Co.,* 160 N.C. 113, 75 S.E. 855 (1912).

A. *The "Doctrine" of proximate cause.*

Appellants

> "have declined to enter upon the wide field of investigation which would have opened up to us if we had attempted a critical review of the doctrine of proximate and remote cause, as it is discussed in cases without number, being admonished against the futility of such a course by the words of a wise judge, when discussing a similar question: 'It would be an unprofitable labor to enter upon an examination of the cases. If we could deduce from them the best possible expression of the rule, it would remain after all to decide each case largely upon the special facts belonging to it, and often upon the very nicest discriminations. One of the most valuable of the criteria furnished us by these authorities is to ascertain whether any new cause has intervened between the fact accomplished and the alleged cause. If a new force or power has intervened, of itself sufficient to stand as the cause of the misfortune, the other must be considered as too remote.' *Insurance Co. v. Tweed,* 7 Wall 44." *Hardy v. Hines Bros. Timber Co.,* 160 N.C. 113, 75 S.E. 855, 859 (1912); *The Santa Rita,* 176 Fed. 890, 895 (9th Cir. 1910).

Washington has embraced a like rule and has adopted the rule of the restatement. Where some damage is foreseeable from a defendant's negligence, all damages which follow in an unbroken sequence are the natural and proximate result of that negligence, whether or not the particular person injured and the manner of injury is foreseeable. *Lewis v. Scott,* 154 W. Dec. 509, 341 P. 2d 488 (1959).

Where there are consecutive independent acts by two persons, liability is imposed upon either or both if it "is a substantial factor in causing harm

to another," *Robillard v. Selah-Moxee Irrigation District,* 154 W. Dec. 709, 711, 343 P. 2d 565, 566 (1959), and "neither can interpose a defense that the prior or concurrent negligence of the other contributed to the injury." *Seibly v. Sunnyside,* 178 Wash. 632, 635, 35 P. 2d 56, 57 (1934); *Anderson v. McLaren,* 114 W. 33, 194 Pac. 828 (1921).

Hellan v. Supply Laundry Co., 94 W. 683, 689, 163 Pac. 9, 11 (1917). ("Appellant should not be permitted to fall between two stools through a mere juggling of terms.") *Schatter v. Berger,* 185 Wash. 375, 55 P. 2d 344 (En Banc 1936).

Here the Findings establish the defendants' negligence. If the combustible litter on the railroad right of way was a fire hazard how did it become less of a hazard by conversion into a vastly greater area of smoldering embers. The court believed that it was "self-evident" that the negligent acts would "contribute to starting the fire or its spread afterwards" (R. 268) and equally "self-evident" (R. 258) that "but for" the resulting fire "plaintiff[s] would not have suffered the stipulated damage" (R. 258). Yet the court said plaintiffs could not recover for failure to prove as a fact what he believed to be "self-evident."

The disaster that occurred was extensive indeed —although far from unprecedented. The trial court previously said:

> "In view of the vastness of the public domain and the tremendous properties owned by the Federal Government, state governments as well, I feel that whether logical or not, there is a distinction, or it will be held that there is a distinction which is perhaps a more literally correct statement of it, between the situation

of real property owned by the Government and real property owned by an individual" (R. 322, 486).

Congress has set at rest any consideration of public policy based upon the vastness of the public domain. The United States Supreme Court has refused to make that distinction favoring the Government at the expense of its citizens in this very case. *Rayonier v. United States,* 352 U. S. 315, 77 S. Ct. 374 (1957).

The fire cannot be fragmentized and an impossible burden of proof and conceptual distinctions between duty, foreseeability and legal causation applied to the fragments. A fair consideration of the danger in removing civil liability—for all practical purposes—for negligence tending to increase fire hazards, forbids application of any such devices. It does not promote the public safety to accumulate fire hazards and lackadaisically put out fires secure in the knowledge that the doctrine of proximate cause eliminates any enforcible duty to do so.

IV. ***Under Washington law the PAW is liable for damages resulting from the fire that originated upon and escaped from its right of way found to have been negligently maintained as a fire haazrd.***

The negligence found against the PAW has always been deemed sufficient grounds for recovery against railroads.

> "The engine may have been perfect in all its parts, the engineer may have been the best obtainable, and the operation of the engine mechanically correct; yet, if under such circumstances as here detailed, appellants permitted sparks or live coals to ignite the combustible

> material upon the right of way and thence to communicate itself to respondent's meadow, they must answer for the damage."[8] *Jordon v. Welch,* 61 Wash. 569, 572, 112 Pac. 656, 658 (1911).

See also *Abrams v. Seattle & Montana Rwy. Co.,* 27 Wash. 507, 68 Pac. 78 (1902);

Jordon v. Spokane, Portland & Seattle Ry. Co., 109 Wash. 476, 186 Pac. 875 (1920);

McCann v. Chicago, Milwaukee & Puget Sound R. Co., 91 Wash. 626, 158 Pac. 243 (1916);

Slaton v. Chicago, Milwaukee & St. Paul Railway Co., 97 Wash. 441, 166 Pac. 644 (1917).

The concurrent and subsequent negligence of the United States in failing to properly fight the fire and extinguish it could not constitute intervening negligence cutting off the liability for the Railroad's initial negligence.

The PAW not only failed to use any effective means to fight the fire the first day but unequivocaly refused to take any responsibility for controlling it as soon as it burned off its right of way (Tr. 87). No PAW crews worked on the fire between August 7 and September 20 (Tr. 199, 248). In fact, about the only action the PAW ever took to suppress the fire was to dump one load of water on a hot spot close to the tracks and to watch railroad bridges on the afternoon and evening of August 6 (Tr. 203-204, 232, 272, 318, 349).

No conduct could more clearly breach the Railroad's duty:

---

[8]And must also answer for damages to the lands of another "burned in the same fire," 61 Wash. at p. 570, 112 Pac. 657.

> "An owner or occupant of forest land with knowledge of a fire burning on such land . . . must exercise ordinary and reasonable care to prevent spread of fire to the damage of others" (R. 179, supra, p. 21).

All of the points urged against the decision of the court exculpating the United States from its negligence apply with even greater force against the decision discharging the PAW of liability. While liability of a landowner is clear under Washington law, liability of a Railroad under the circumstances of this case is all but universal. A superficial analysis of Government land ownership might result in legal finicalism preserving the form but destroying the substance of legal liability for the supposed protection of the public welfare. Such a course has no justification at all insofar as the PAW is concerned. Events have proved that the public interest was grievously damaged by the negligence of the PAW.[9]

The "vastness of the public domain" (R. 486) is traversed by thousands of miles of railroads. A policy of legal immunity of the public domain from claims of innocent third parties would subject it to the real danger of destruction by fire through maintenance of fire hazards by these railroads. Indeed, in this very case, the United States could not recover its own loss for the same lack of legal "casual relationship between any negligence of PAW and the loss of Government timber" (R. 204) although damage was done to Government lands from the moment of ignition. Under the court's ruling the Government would appear foreclosed from even claiming its fire fighting costs for its initial attack

[9]The United States suffered losses far in excess of those of the plaintiffs.

upon the fire on August 6th. The United States should not enjoy nor suffer from any double standard depending upon whether or not it is a plaintiff or a defendant. Nor should a tort-feasor partake of any such supposed public policy depending upon whether or not the United States is joined as a party. The Tort Claims Act was intended to remove the shield of sovereign immunity not to extend it to prior and concurrent tort-feasors in any guise.

For all the reasons previously given for holding the Government liable and to afford the Government itself protection against the fire hazard of debris-littered railroads, the PAW should be held liable.

V. ***Fibreboard's negligence and violations of statute were a substantial factor in causing plaintiffs' damages.***

The court below summarily disposed of Fibreboard's liability upon two main grounds:

(a) For all acts and omissions prior to the September 20 breakout of the fire, it was not liable even if it knew of inadequate action taken against the fire upon its lands because it would not have

> "felt authorized or obliged to intervene and to interfere in any particular with the Forest Service supervision and control of the fire-fighting" (R. 189), and

(b) "Under the circumstances, indisputably shown by the evidence, finding of negligence on the part of Fibreboard in not disposing of the slash in the vicinity of the 1,600-acre tract . . . is not justified" (R. 189).

A. *Facts relating particularly to Fibreboard liability.*

The PAW locomotive stopped at Fibreboard Camp One at about 12:15 on August 6, 1951 (Tr. 313). A report of a fire was sent from that point at that time (Tr. 307). Ranger Floe called the Fibreboard timekeeper sometime prior to 1:00 p.m. (Tr. 535, 538) to get action from the train crew. The timekeeper, Mr. Stovall (Tr. 4502) died previous to the trial (Tr. 4503) and it was therefor impossible to determine precisely what then occurred.

In any event, he did not transmit the message nor inform Floe that the locomotive had broken down, probably because he was busy scaling logs (Tr. 4502). The loggers and truckdrivers going through the camp at that time (Tr. 324) were released by Fibreboard and went into town. In short, prior to 1:00 a.m. Fibreboard knew of the Heckleville fire, had men available but released them, although men could have walked a mile and a half down the tracks in about half an hour or 40 minutes (Tr. 358, 545).

Up to at least 1:35 p.m. the four-man train crew could have extinguished the fire (Tr. 537). Had Fibreboard dispatched the train crew or some of its own men they would have arrived at the Heckleville fire by that time and an hour before the Forest Service arrived. A prudent landowner, knowing of the unattended fire in the vicinity of Fibreboard slash would have taken instant action to suppress the fire (Tr. 3870). Fibreboard employees at Camp One knew of the fire, knew that Floe wanted to send back the PAW locomotive and knew or ought to have known that the locomotive had broken

down and knew or ought to have known of the existence of slash on adjacent Fibreboard land.

On August 7, 1951, the fire escaped the sixty-acre area first into slash on the Government's land (Tr. 3527) and then into Fibreboard slash (Tr. 2011-2012). The 1,600-acre area itself was practically all Fibreboard land (Tr. 891) that had previously been logged over (Tr. 4465). The fire spread through slash left from that operation (Tr. 4202). The fire was stopped mostly by green timber.

Slash is the debris left in the woods after logging. It is an abnormal concentration of fuel. When fire gets into slash it is nearly impossible to control because it burns with terrific heat, creates lots of convection currents and spreads sparks far ahead (Tr. 2675, 3468, 3789-3790, 4004, 4130-4131). Mr. Colville, in the Regional Forest Service branch in charge of slash burning and fire adviser to district rangers (Tr. 3990) had inspected the slash in the Sol Duc Valley with Mr. Floe in 1949 (Tr. 4131). At that time and with particular reference to the area where the Heckleville fire occurred (Tr. 4133) he pointed out that if there was a fire in that area it was going to be a big one (Tr. 4134). He even wrote a memorandum to that effect to his superiors (Tr. 4195).

When the 1,600-acre fire was temporarily subdued, the west fire line was immediately adjacent to at least three quarter-sections of slash created by Fibreboard in 1946 or 1947 (Tr. 1970, Ex. 112). Landing 1, just inside the perimeter of the 1,600-acre fire, had been logged at the same time. The breakout of September 20, 1954 was at Landing 1. When first seen in the early morning there was a

"wall of fire" in the slash (Tr. 1715) and there was fire around Landing 1 (Tr. 1707) but no fires or smoke visible elsewhere in the 1,600-acre burn (Tr. 1708, 1764, 1765, see infra p. 18).

Fibreboard had permitted this slash to accumulate because "we have made it a policy not to burn slash in general unless we are told to" (Tr. 4454).[10] If a landowner chose such a policy, Ranger Floe did nothing about it because:

> "If he wanted to carry that hazard, it was his" (Tr. 415).

Ranger Floe therefore did nothing about the slash although he had long regarded it as a fire hazard (Tr. 500-501). Fibreboard, although it knew of the breakout of September 13, 1959 (Tr. 2017) did nothing whatsoever to protect the slash from ignition by the adjacent 1,600-acre fire (Tr. 2024). The only reason suggested was that Fibreboard relied upon Fanger Floe and had offered to do what he asked. In at least three respects, however, Fibreboard did take action against the fire. During the early stages of the fire Fibreboard "just went out to put out the spot fires in that area" without regard to any chain of command (Tr. 2052). It thought it would be desirable to obtain access to the east side of the fire more directly from Camp One and therefore put in some access roads after talking to Floe (Tr. 2052). On September 20, 1951, after the breakout, Fiberboard sent its crew out to suppress spot fires with-

[10]At the trial some attempt was made to show that this particular slash hadn't been burned because of nearby snags on state land. Mr. Hartnagel, Fibreboard's logging manager (Tr. 4422) said that "The chances are we wouldn't have burned the slash in any event" (Tr. 4454). Weather conditions had permitted some slash burning in the area in each of the ten years preceding 1951 (Tr. 421, 422).

out waiting for or receiving any instructions to do so (Tr. 2034, 4456).

Argument and the court's finding that Fibreboard could not interfere with the Forest Service's management of the fire was essentially pointless. No one suggested it should be so. All of the evidence—and Fibreboard's conduct at the time—show that there were many things Fibreboard could have done without disrupting the fire organization in the slightest.

Thus it is sound practice, involving no possible hinderance to management of a fire to proceed immediately to the scene without awaiting arrival of the Forest Service (Tr. 2838, 4205, 4421) or to patrol it if the Forest Service is unable to do so for lack of funds, manpower or any other reason (Tr. 2871). The fire was burning, after all, on Fibreboard land, in proximity to Fibreboard slash and green timber. It would not have affected the fire organization one whit if Fibreboard had taken advantage of rainy days to work on the fire (Tr. 3694, 3695). Ranger Floe did nothing to keep Fibreboard from putting out the smoldering fires in Landing One and elsewhere in the 1,600-acre area or from patrolling or guarding the fire day or night (Tr. 949-950). Fibreboard, like any private owner of land affected by a fire could sit in on Forest Service meetings about fire tactics and strategy (Tr. 1360-1361).

The only possible consequence that anyone could think of that might militate against Fibreboard's taking action to suppress fire was the possible legal complications if something went wrong (Tr. 4208, 4450)—as indeed happened.

At the time, of course, the Forest Service and Fibreboard were negotiating as to costs of fighting the fire. Mr. Colville had, on August 9, 1951, observed Fibreboard slash in the 1,600-acre fire. He "saw red," when he learned that similar slash had burned and called for a conference with Fibreboard (Tr. 4202-4203). He demanded that Fibreboard pay the cost of fighting the fire. Fibreboard agreed on the spot it would pay its own costs in fighting the fire "pending determination" — the determination still being pending at the time of trial seven years later (Tr. 4203).

The delicate Alphonse-Gaston minuet followed— Fibreboard cooperating but doing little or nothing that might be construed as an admission of liability or result in more than minimal expense to it; the Government not requesting services sufficient to endanger the tentative settlement made on the spot. While this explains, it does not justify Fibreboard's studied abandonment of its duties as a landowner with a dangerous fire burning on its premises or the Forest Service's neglect of its duties to other property owners.

Doing nothing when action is demanded can constitute negligence. The testimony of Ranger Floe negatives any inference that action and precautions by Fibreboard would have interfered with the Forest Service. The fire was almost entirely upon Fibreboard lands from August 7 to August 10, during which period the action taken was negligent. Unless it appears that the Government would have refused aid or fire-fighting activities tendered by Fibreboard as the affected owner, then Fibreboard's failure to take action must likewise be actionable. *Thomas v. Casey,* 49 Wn. 2d 14, 297 P. 2d 614 (1956).

It is erroneous to dismiss Fibreboard from this action on the basis of the court's finding that Fibreboard was not authorized or obliged to interfere with the Forest Service's management of the fire. The court did not meet the issues of law established in the pre-trial order (R. 404, Para. 4). Fibreboard was under a clear duty to use reasonable care independent of the Forest Service.

State v. Gourly, 209 Ore. 363, 305 P. 2d 396 (En Banc 1956) held on the precise question that the duties of a landowner and a fire-fighting agency (a private association, supported by assessments) were independent and that each of them must make "every reasonable effort to control the fire" taking into account, of course, the acts of the others. Washington law is equally clear.

While a landowner should follow the directions of the state forester "it is always within his power to refuse to proceed if he thinks the forester's precautions inadequate and within his power to take precautions in addition to those prescribed by the forester." *Galbraith v. Wheeler - Osgood Co.,* 123 Wash. 229, 212 Pac. 174, 176 (1923). It is not due care for a private landowner to rely upon the fact that a slash fire "was started, directed and supervised by fire wardens of the state." *Wood & Iverson, Inc., v. Northwest Lum. Co.,* 141 Wash. 534, 208, 252 Pac. 98 (En Banc 1926).

In holding to the contrary, the court below clearly erred as a matter of fact from the record and as a matter of law under governing Washington law.

B. ***The evidence establishes that the slash accumulated by Fibreboard upon its lands was a hazard in fact and negligence per se under applicable Washington laws.***

There is apparently much dispute under current utilization practices, whether to burn logging refuse or to suffer the increased fire hazard over the time it takes for natural deterioration to dispose of the danger. In terms of forest management some foresters feel the added fire risk is justifiable considering the beneficial results in regrowth. No one, however, asserted that slash is not a major hazard.[11]

Washington law declares that land "covered wholly or in part by inflammable debris created by logging . . . shall constitute a fire hazard" (R.C.W. 76.04.370). A special statute governs the Olympic Peninsula, the area where this slash was created. That statute makes it "unlawful . . . to do or commit any act which shall expose any of the forest or timber upon such lands to the hazard of fire" (R.C.W. 76.04.450).

Prior to 1929, R.C.W. 76.04.370 declared slash to be a public nuisance. Maintenance of slash was therefore negligence *per se* giving rise to civil liability (R. 190).[12] *Great Northern Railway v. Oakley,* 135 Wash. 279, 237 Pac. 990 (1925). Upon its amendment and substitution of the term "fire hazard," with specific provision and remedies for abatement, it is possible to argue as did the court

[11]It is also true that there might be occasions when it is impossible to safely dispose of slash immediately. The Fibreboard slash here involved had been created four and five years earlier. During the ten years preceding 1951 weather conditions had permitted at least some slash burning in each year in the district (Tr. 421, 422). The decision not to dispose of it was one of policy.

[12]The court below pointed out that the question of law of absolute liability "has never been presented to the Washington Supreme Court." The liability in negligence for violation of the statute was, however, presented to and decided by the court in the *Oakley* case.

below that such a result no longer generally obtains under R.C.W. 76.04.370. It is not possible, however, to do so with respect to Olympic Peninsula lands. As to such lands the only change has been to convert slash from a "public nuisance" to an "unlawful . . . hazard of fire."

The rule of liability to be applied is not one of "liability without fault"[13] but the liability for conduct proscribed by staute. *Theurer v. Condon,* 34 Wn. 2d 448, 209 P. 2d 311 (1949); *Pig'n Whistle Corporation v. Scenic Photo Pub. Co.,* 57 F. 2d 854 (9th Cir. 1932).

Washington has long adhered to the rule that a civil cause of action may arise from a Washington statute criminal in form,[14] a ruling which this court applied to sustain a recovery by the United States for fire damage done to its timber. *Spokane International Ry. Company v. United States,* 72 F. 2d 440 (9th Cir. 1934).

---

[13]Appellants did not contend that the statutes impose "liability without fault" but did contend that the statutes impose standards of care, the violation of which is negligence *per se.* Both statutes cited have an obvious factual basis in the danger to be apprehended from slash. The record abundantly supports the danger of slash as a matter of fact and the possibility of disposing of it. The defendant did not here seek to prove that it could not have disposed of the slash—only that its policy was wiser than the standard established by law. In *State v. Canyon Lumber Corporation,* 46 Wn. 2d 701, 284 P. 2d 316 (1955), the Washington Supreme Court held that the question of whether or not R.C.W. 76.04.370 imposed liability without fault should await a case requiring such a determination. Where, as here, the defendant created the hazard, deliberately suffered it to remain on his premises and had notice of the slash and time to dispose of it, the question of liability without fault is not raised.

[14]Most recently in *Browning v. Slenderella Systems of Seattle,* 154 W. Dec. 586, 341 P. 2d 882 (1959 En Banc).

The wisdom of slash disposal was not and could not be relevant in this action. If it is wiser to suffer the hazard of fire while it deteriorates slowly, the legislature might be persuaded to change the law. One might as easily contend that a drunken driver failing to yield the right of way at an intersection in the early hours of January 1 was not negligent because many other New Year's Eve celebrants were equally drunk and the posted right of way route unduly restricted the flow of traffic.

Fibreboard conceded in the pre-trial order that

> "The purpose of burning logging debris is to decrease the risk of spread of fire . . ." (R. 400).

That is the reason and purpose of the statutes declaring slash a fire hazard and prohibiting maintenance of a fire hazard upon the Olympic Peninsula. It may be true, as contended by Fibreboard, that it is:

> "common practice among timber owners and operators not to burn logging debris unless it presents an unusually hazardous situation and unless required to do so by the State Fire Warden or Federal Forest Ranger" (R. 400).[15]

It cannot be contended, however, that common negligence is any the less actionable. Accepting its contention as fact, only proves that Fibreboard has and will continue to assume the risk of spread of fire as a matter of policy. The deliberate choice of risk is no less negligent than the inadvertent creation of one. It is difficult to see why Fibreboard will ever go to the expense of burning slash now that its policy has received the law's stamp of approval.

---

[15]The failure of Ranger Floe to give such notice could not excuse non-compliance with the law. *Pig'n Whistle Corporation v. Scenic Photo Pub. Co.,* 57 F. 2d 854 (9th Cir. 1932).

Under Washington law:

> "An owner or occupant of forest land with knowledge of a fire burning on such land, even though started by strangers must exercise ordinary and reasonable care to prevent spread of the fire to the damage of others. Failure to do so is negligence rendering the landower or occupant liable for all damages proximately resulting therefrom" (R. 179).

Here Fibreboard knew of the fire burning on its lands, yet took no care of it. It knew of the fire hazard it had created and chose to continue it. That slash contributed to the spread of the fire to 1,600 acres and to its final breakout. The fire spread directly from its lands to the land of the plaintiff.

Whether or not Fibreboard "felt authorized or obliged to intervene and to interfere . . . with the Forest Service" is immaterial. Its duty was imposed by law. Under the evidence it was authorized and the Forest Service would have welcomed all of the mop-up and patrolling Fibreboard could have supplied—if only to relieve itself of expense.

CONCLUSION

The catastrophe that damaged plaintiffs was inexcusable. The court has found negligence before, at, and after its inception. No legal semantics outweigh the overwhelming evidence and factual findings that the disaster was man-made and avoidable. No useful purpose is served by promulgating or approving a *ratio decidendi* as removed from reality as the decision below. Great damage is done to the fabric of the law when it is cut to clothe a particular case.

Upon the findings of fact the judgment below should be reversed as to the United States and PAW and on the preponderance of the evidence and the law of the State of Washington the judgment should be reversed as to defendant Fibreboard and plaintiffs awarded the damages caused them by defendants' negligence.

DATED at Seattle, Washington, this 7th day of December, 1959.

FERGUSON & BURDELL
W. H. Ferguson,
Donald McL. Davidson,
Attorneys for Appellants.

929 Logan Building
Seattle 1, Washington

APPENDIX A

Portions Of Findings Of Fact and Conclusions Of Law Specified As Error

Findings of Fact

Finding XII

". . . an extraordinary concurrence of high temperature, low humidity and gale-force wind occurred, causing a flareup of fire inside the 1600-acre area, . . . "

Finding XIII

". . . However it has not been established by a preponderance of the evidence that such failure to exercise ordinary care proximately caused or contributed to the start or subsequent spread of the Heckleville fire." (R. 234)

Finding XIV

"It is not shown by a preponderance of the evidence that PAW failed to use ordinary care in any particular alleged herein other than as stated above in Finding No. XIII." (R. 234)

Finding XV

"Plaintiffs did not show by a preponderance of the evidence that defendant Fibreboard failed to use ordinary care in any of the particulars of negligence alleged by plaintiffs." (R. 234)

Finding XVI

". . . Whether or at what time and place, the fire might have been contained or suppressed within said area but for such negligence is a matter of speculation and cannot be determined as a reasonable probability under the evidence. It has not been established by a preponderance of the evidence that had such

negligence not existed, the fire would have been contained in the 60-acre area, or that there is any causal relationship between that negligence and the ultimate existence of fire in the 1600-acre area." (R. 235)

Finding XVII

"Plaintiffs did not show by a preponderance of the evidence that defendant United States failed to use reasonable care in mop-up or other firefighting activities after August 7, or in any other particular alleged by plaintiffs, except as found in Findings No. XIII and XVI above." (R. 235)

Finding XVIII

"Plaintiffs and . . . United States of America . . . have failed to sustain the burden of proving by a preponderance of the evidence that any of the damages claimed were proximately caused or contributed to by any negligence on the part of defendant herein. The sole proximate cause of the damages to plaintiffs in the amounts stipulated herein was the unforeseeable and fortuitous combination of wind and weather conditions occurring on September 20, 1951." (R. 235-236)

Conclusions of Law

Conclusion III

". . . The negligence of either defendant did not proximately cause or contribute to causing either the start or the spread of the Heckleville fire, and in no way is a proximate cause of plaintiffs' damages." (R. 236)

Conclusion V

"No negligence of any defendant hereby proximately caused or contributed to any of the damages claimed by plaintiffs." (R. 237)

Conclusion VI

"Plaintiffs' actions should be dismissed with prejudice and with costs to the prevailing parties." (R. 237)

—o—

In summary, Findings XIII, XVI and XVIII and Conclusions III and V all relate to proximate cause. Findings XII, XIV, XV, and XVII, by reference to the Court's memorandum decision, incorporated in the findings, also relate to the issue of causation, since the Court failed to consider numerous claimed acts of negligence and in the end dismissed those discussed because:

"if negligence be assumed in any particular charged, causal relationship between such negligence and the breakout and spread of the fire on the early morning of September 20 is a matter of speculation and conjecture and not shown as a reasonable probability." (R. 200-201)

APPENDIX B

Witness Index To Typewritten Transcript Of Testimony

Witness	*Lawyer*	*Date*	*Volume*	*Page*
ANDERSON, JAMES O. F.				
Direct	Cushman		X	3203
	McKelvy			3220
Cross	Ferguson			3221
	Marion			3236
BRODHUN, HENRY J.				
Direct	Ferguson		1	298
	Marion			322
Cross	Cushman			324
	Schmechel			328
Redirect	Ferguson			338
BURR, EDWARD				
Direct	Ferguson		I	340
	Marion			352
Cross	Cushman			354
	Schmechel			355
COLVILL, LESLIE L.				
Direct	Cushman		XII	3984
	Schmechel			4050
Direct	McKelvy	1/22/58	XII	4061
	" (cont'd)	1/22/58	XIII	4095
Cross	Ferguson			4100
	Anderson			4210
Redirect	Cushman			4246
	Reifenberg	1/24/58		4251
	Schmechel			4255
	McKelvy			4257
COWAN, CHARLES S.				
Direct	Ferguson	12/19/57	VII	2305
	" (cont'd)	1/6/58	VIII	2370

Witness	*Lawyer*	*Date*	*Volume*	*Page*
Cross	Cushman			2422
	Schmechel			2478
	MeKelvy			2507
	Schmechel			2525
Redirect	Ferguson			2526
Recross	Cushman			2531
CRAMER, OWEN P.				
Direct	Reifenberg	1/14/58	X	3314
	Schmechel			3352
Cross	Anderson			3357
	Ferguson			3373
Redirect	Reifenberg	1/14/58	X	3400
	Schmechel			3403
CUNNINGHAM, ROBERT F.				
Direct	Marion	12/17/57	VI	1877
	Ferguson			1909
Cross	Cushman			1911
	Schmechel			1944
	McKelvy			1955
Redirect	Marion			1957
Direct	Cushman	1/24/58	XIII	4259
	McKelvy			4296
Cross	Anderson			4302
Redirect	Cushman			4312
DRAKE, EDWARD GRANT				
Direct	Ferguson	12/11/57	IV	1363
	" (cont'd)	12/12/57	V	1442
	Marion			1537
Cross	Cushman			1548
	Williams	12/13/57		1599
	McKelvy			1605
Redirect	Ferguson			1625
	Marion			1632

Witness	*Lawyer*	*Date*	*Volume*	*Page*
Recross	Cushman			1636
	Williams			1637
DRAKE, GEORGE L.				
Direct	Cushman	1/16/58	XI	3717
	" (cont'd)	1/17/58	XII	3750
	Schmechel			3803
	McKelvy			3811
Cross	Ferguson			3831
	Anderson	1/22/58		3951
Redirect	Cushman			3972
	Schmechel			3982
EVANS, LLEWELLYN J.				
Direct	Marion	12/9/57	III	985
	" (cont'd)	12/10/57	IV	1061
	Ferguson			1138
Cross	Cushman	12/11/57		1257
	Williams			1305
	McKelvy			1319
	Reifenberg			1356
Redirect	Marion			1332
	Ferguson			1345
	Marion			1358
Recross	McKelvy			1359
Direct	Ferguson	1/29/58	XIV	4601
FLOE, SANFORD M.				
Direct	Ferguson	12/4-5/57	II	372
	Marion	12/5/57		700
	" (cont'd)	12/6/57	III	733
Cross	Cushman			802
	Schmechel			861
	McKelvy	12/9/57		881
Redirect	Ferguson			913
	Marion			951
	Ferguson			969

Witness	*Lawyer*	*Date*	*Volume*	*Page*
Recross	Cushman			981
	Schmechel			982
	McKelvy			983
Direct	Cushman	1/14/58	X	3406
	" (cont'd)	1/15/58	XI	3426
	Schmechel			3473
	McKelvy			3476
Cross	Ferguson			3478
	Anderson			3534
Redirect	Cushman	1/24/58	XIII	4313
Direct	McKelvy	1/28/58	XIV	4419
	Cushman			4421
Cross	Ferguson			4421
Redirect	Schmechel			4537
	Cushman			4543
Direct	Ferguson	1/29/58		4610
FRASER, DONALD E.				
Direct	Reifenberg	1/14/58	X	3294
	McKelvy			3299
	Schmechel			3312
Cross	Ferguson			3309
Redirect	Reifenberg			3310
HARTNAGEL, ARTHUR N.				
Direct	Ferguson	12/19/57	VII	2279
Cross	McKelvy			2302
Redirect	Ferguson			2304
Recross	McKelvy			2304
Direct	McKelvy	1/28/58	XIV	4422
	Cushman			4450
Cross	Ferguson			4451
Redirect	Reifenberg			4475
Recross	Anderson			4476

Witness	*Lawyer*	*Date*	*Volume*	*Page*
HOPKINS, C. J.				
Direct	McKelvy	1/24/58	XIII	4353
	Cushman			4378
Cross	Ferguson			4379
JACOBSON, NORMAN G.				
Direct	Marion	1/9/58	IX	3034
	" (cont'd)	1/10/58	X	3052
Cross	Cushman			3092
	Schmechel			3132
	McKelvy			3188
JONES, HAROLD H.				
Direct	Marion	1/7/58	VIII	2534
	Marion	1/9/58	IX	2876
Cross	Cushman			2905
	Schmechel			2972
	McKelvy			3016
LeGEAR, HARRY				
Direct	Ferguson	12/2/57	I	12
	Marion			84
Cross	Cushman			89
	Schmechel			108
Redirect	Ferguson			130
	Marion			147
Recross	Cushman			151
Redirect	Schmechel	1/24/58	XIII	4325
Cross	Ferguson			4342
Redirect	Reifenberg			4350
	Schmechel			4351
LEYH, JOHN H. (Deposition)				
Direct	Wesselhoeft	3/26/53	V	1381
Cross	Dovell			1432
	Schmechel			1435
	McKelvy			1437z
Redirect	Wesselhoeft			1438

Witness	*Lawyer*	*Date*	*Volume*	*Page*
McCAIN, GEORGE E.				
Direct	Marion	12/16/57	VI	1821
Cross	Cushman			1835
McCULLOUGH, R. N.				
Direct	Cushman	1/15/58	XI	3542
	Schmechel	1/16/58		3601
	McKelvy			3608
Cross	Ferguson			3611
	Anderson			3696
Redirect	Cushman			3706
McDONALD, LEROY				
Direct	Ferguson	12/13/57	V	1669
	Marion			1728
Cross	Cushman			1733
	" (cont'd)	12/16/57	VI	1757
	Schmechel			1775
	McKelvy			1779
Redirect	Ferguson	12/16/57	VI	1787
	Marion			1797
MELIN, JOHN BERNARD				
Direct	Anderson	12/18/57	VII	2127
	Ferguson	12/19/57		2217
Cross	Cushman			2221
	McKelvy			2255
Redirect	Anderson			2259
	Ferguson			2273
Recross	Cushman			2275
	McKelvy			2277
MERCHANT, GLEN S.				
(Deposition on Written Interrogatories)				
Direct	Cushman	11/25/57	X	3283
Answers				3289
Cross	Wesselhoeft			3285
Answers				3291

Witness	*Lawyer*	*Date*	*Volume*	*Page*
ORR, WALTER E.				
Direct	Ferguson	12/3/57	I	257
	Marion			281
Cross	Cushman			284
	Schmechel			288
Cross	Cushman	12/3/57	I	297
	Ferguson			298
PAULEY, J. COURTNEY				
Direct	Anderson	1/29/58	XIV	4561
Cross	Cushman			4583
PEARSONS, PETRUS				
Direct	Ferguson	12/17/57	VI	1961
	" (cont'd)	12/18/57	VII	2042
Cross	Cushman			2063
	Schmechel			2076
	McKelvy			2078
Redirect	Ferguson			2105
Recross	Cushman			2126
Direct	McKelvy	1/28/58	XIV	4480
	Reifenberg			4518
Cross	Ferguson			4526
Redirect	McKelvy			4535
RUSSELL, CARL H.				
Direct	McKelvy	1/28/58	XIV	4387
	Schmechel			4407
Cross	Ferguson	1/28/58	XIV	4410
Redirect	McKelvy			4417
	Reifenberg			4417
SCHAEFFER, WALTER H.				
Direct	Ferguson	1/7/58	VIII	2619
	" (cont'd)	1/8/58	IX	2683

Witness	*Lawyer*	*Date*	*Volume*	*Page*
Cross	Cushman			2685
	Schmechel			2750
	McKelvy			2835
Redirect	Ferguson			2870
SMITH, CLYDE				
Direct	Marion	12/16/57	VI	1798
Cross	Cushman			1809
	Schmechel			1816
Redirect	Marion			1818
Recross	Cushman			1819
Redirect	Marion			1820
TRUAX, ARTHUR R.				
Direct	Schmechel	1/24/58	XIII	4317
	Reifenberg			4325
WALKEN, ADOLPH H.				
Direct	Marion	12/16/57	VI	1845
	Ferguson			1860
Cross	Cushman			1862
	Schmechel			1874
WELCH, WAYNE				
Direct	Ferguson	12/2/57	I	155
	Marion	12/3/57		205
Cross	Cushman			211
	Schmechel			234
Redirect	Ferguson			249
	Marion			254
Recross	Cushman			256
YOUNG, ROGER N.				
Direct	Marion	12/13/57	V	1604
Cross	Cushman			1661
	Williams			1665
	McKelvy			1669

APPENDIX B

EXHIBITS INDEX TO TYPEWRITTEN TRANSCRIPT OF TESTIMONY

One hundred eighty-two exhibits were numbered by the District Court Clerk at the trial and all of them are included in the record on appeal to be submitted to this Court. As many of these exhibits as may be so accommodated will be transmitted to this court in accordion style compartmented file jackets, each numbered compartment of which will enclose the exhibit with the corresponding number. Exhibits so filed will not be described herein except by number. Exhibits such as rolled aerial photographs and maps which cannot be accommodated in file jackets may be difficult to identify. Therefore, they will be described in this appendix in the same terms as used in the pretrial order. Exhibits as to damages, included in the record but not offered because of the intervening stipulation as to damages, will be so designated to distinguish them from exhibits pertaining to liability.

Exhibit No.	Description	Identified	Offered	Rejected	Received
1		II- 365 R 4	II- 365		II- 365
2		II- 365 R 4	II- 365		II- 365
3		II- 365 R 5	II- 365		II- 365
4		II- 365 R 6	II- 365		II- 365
5		II- 365 R 6	II- 365		II- 365

Exhibit No.	Description	Identified	Offered	Rejected	Received
6		II- 365 R 6	II- 365		II- 365
7		II- 365 R 7	II- 365		II- 365
8		II- 365 R 8	II- 365		II- 365
9		II- 365 R 9	II- 365		II- 365
10		I- 137 I- 139 III- 967 R 8	I-138 III- 967		I- 140 III- 967
11		I- 137 I- 139 III- 967 R 8	I- 139 III- 967		I- 140 III- 967
12		II- 385 R 9	II- 386		II- 386
13		II- 388 R 9	II- 389		II- 390

Exhibit No.	Description	Identified	Offered	Rejected	Received
14		II- 423 R 9	II- 425		II- 426
15		II- 460 R 10	II- 461		II- 461
16		II- 461 R 10	II- 461		II- 461
17		II- 461 R 10	II- 462		II- 462
18		II- 462 R 10 R 11	II- 462		II- 462
19		I- 41 R 11	I- 44		I- 44
20		I- 39 R 11	I- 40		I- 40
21		I- 41 R 11	I- 41		I- 41
22		I- 46 R 11	I- 48		I- 49

Exhibit No.	Description	Identified	Offered	Rejected	Received
23		I- 48 R 11	I- 50		I- 50
24		II- 401 R 12	II- 401		II- 401
25		R 12	N.O.*See Ex. 80		
26		II- 667 R 13 R 17	II- 667		II- 671
27		I- 58 R 13	I- 58		I- 59
28		III- 967 R 13	III- 967		III- 968
29		II- 501 R 14	II- 501		II- 502
30		II- 509 R 14	II- 509		II- 509

*Not Offered

Not Offered

Exhibit No.	Description	Identified	Offered	Rejected	Received
31		II- 509 R 14	II- 509		II- 509
32		II- 509 R 14	II- 509		II- 509
33		II- 509 R 14	II- 509		II- 509
34		II- 509 R 14	II- 509		II- 509
35		II- 509 R 14	II- 509		II- 509
36		II- 509 R 14	II- 509		II- 509
36-A		VII-2154	VII-2156		VII-2159
37		III- 968 R 15	III- 968		III- 968
38		III- 968 R 15	III- 968		III- 968
39		III- 968 R 15	III- 968		III- 968

Exhibit No.	Description	Identified	Offered	Rejected	Received
40		I- 60 R 15	I- 60		I- 60
41		I- 60 R 15	I- 60		I- 60
42		I- 60 R 15	I- 60		I- 60
43		I- 60 R 15	I- 60		I- 60
44		I- 61 R 15	I- 61		I- 61
45		III- 830 R 17	III- 831		III- 831
46		III- 996 R 17	III- 996		III- 996
47		II- 682 R 17	II- 682		II-683
48		II- 674 R 18	II- 673		II- 676

Exhibit No.	Description	Identified	Offered	Rejected	Received
49		III- 968 R 18	III- 968		III- 968
50	Damages	R 21	XIV-4596		
51	"	XIV-4572 R 21	XIV-4596		XIV-4597
52	"	XIV-4570 R 21	XIV-4596		XIV-4597
53	"	XIV-4570 R 21	XIV-4596		XIV-4597
54	"	R 21	N.O.		
55	"	R 21	N.O.		
56		R 22	N.O.		
57		R 22	N.O.		
58		R 23	N.O.		
59		R 23	N.O.		
60		III- 969	III- 968 III- 969		III- 970

Exhibit No.	Description	Identified	Offered	Rejected	Received
61		III-1003	III-1003		III-1003
62		IV-1214	IV-1214		IV-1214
63			NO.O.		
64		III- 970	III- 970		III- 970
65		II- 672 III- 971	II- 673 III- 970 III- 971		III- 973
66		II- 612 IV-1093	II- 613 IV-1094		II- 613 IV-1094
67		III- 973	III- 973		III- 973
68		III- 996	III- 996		III- 996
69		III- 996	III- 996		III- 996
70			N.O.		
71			N.O.		
72		V-1578	V-1578		V-1578
73		II- 522	II- 522		II- 522
74		II- 660 X-3261	II- 660 X-3261		II- 662 X-3262

Exhibit No.	Description	Identified	Offered	Rejected	Received
74		II- 660 X-3261	II- 660 X-3261		II- 662 X-3262
75		III- 973	III- 973		III- 974
76		V-1578	V-1578		V-1578
77		III- 817	III- 817		III- 817
78			N.O.		
79			N.O.		
80		II- 372	II- 373		II- 373
81		IV-1280	IV-1281		IV-1283
82		III- 974	III- 974		
83		III- 974	III- 974		III- 974
84		V-1269	IV-1270		
85		VII-2269	VII-2269		VII-2269
86		X-3262	X-3262		X-3264
87			N.O.		
88		III- 975	III- 975		III- 975

Exhibit No.	Description	Identified	Offered	Rejected	Received
89			III- 975		
		X-3264	X-3264		X-3264
90		X-3264	X-3264		X-3264
Govt. 91	Damages		N.O.		
Govt. 92	"		N.O.		
Govt. 93	"		N.O.		
Govt. 94	"		N.O.		
Govt. 95	"		N.O.		
Govt. 96	"		N.O.		
Govt. 97	"		N.O.		
Govt. 98	"		N.O.		
Govt. 99	"		N.O.		
Govt. 100	"		N.O.		
Govt. 101		II- 369	II- 368		II- 371
Govt. 102		II- 369	II- 368		II- 371
Govt. 103			N.O.		
Govt. 104		VII-2225	VII-2225		VII-2226

Exhibit No.	Description	Identified	Offered	Rejected	Received
Govt. 104		VII-2225	VII-2225		VII-2226
Govt. 105			N.O.		
Govt. 106		II- 525	II- 55		II- 525
Govt. 107		XIV-4617	XIV-4617		XIV-4617
Govt. 108	Composite United States Geological Survey Map of Western Clallam County and environs on which there is traced the general outline of the entire burn area.	III- 952	III- 952		III- 952
Govt. 109	Map of the northwestern corner of the State of Washington prepared by the Forest Service in 1933.		N.O.		
Govt. 110	Vanorsdel map--a tracing of the area near the point of origin of the fire, including portions of Sections 29, 30, 31 and 32, Township 30 North, Range 10 West W.M.	III- 975	III- 975		

Exhibit No.	Description	Identified	Offered	Rejected	Received
111	Vanorsdel map entitled "Origin of Fire, August 6 and 7, 1951." Field surveys made by R. W. Ensley and G. E. Lahti on March 26-30, 1953 and May 11-15, 1953; prepared under the direction of John P. Vanorsdel, Consulting Engineer. This map shows portions of Sections 29 and 30, Township 30 North, Range 10 West. It indicates the main line of the Port Angeles Western Railroad, the old railroad grade, areas of burned reproduction and slash, unburned reproduction and slash-burned sapling timber. The fire boundaries, type boundaries, cat fire trail, hand fire trail, Camp Creek and certain monuments are indicated. The	II- 577	II- 578		II- 579

Exhibit No.	Description	Identified	Offered	Rejected	Received
	uments are indicated. The scale of the map is 1" equals 100'. Map shows contours at intervals of 25 feet.				
112	Vanorsdel map entitled "1600-acre Fire Map." Field surveys made by R. W. Ensley and G. E. Lahti on March 26-30, 1953 and May 11-15, 1953; prepared under the direction of John P. Vanorsdel. This map shows Sections 26 to 35, Township 30 North, Range 10 West and identifies the location of landings, logging truck roads, the boundary of the original fire in the 1600-acre area, the subdivision in the 1600-acre area, cat fire trails, type boundaries, areas of green timber, unburned reproduc-	I- 27	I- 27		I- 27

Exhibit No.	Description	Identified	Offered	Rejected	Received
	tion, burned reproduction and slash-burned and sapling timber. It shows the area of the original fire, that is, the fire within the 1600-acre area, and areas covered by clearance certificate. It identifies the location of the old railroad grade, the Port Angeles western main line, the Olympic Highway, Heckleville, the Soleduck River and Camp Creek.				
112-A	Fibreboard overlay to Ex. 112	VII-2246	VII-2246		VII-2247
113	Vanorsdel map entitled "Vicinity Bap of Landing No. 1." Field surveys made by R. W. Ensley and G. E. Lahti on March 26-30, 1953 and May 11-15, 1953; pre-	III- 849	III- 849		III- 851

by R. W. Ensley and G. E. Lahti on March 26-30, 1953 and May 11-15, 1953; pre-

Exhibit No.	Description	Identified	Offered	Rejected	Received
	pared under the direction of John P. Vanorsdel. This map shows the truck road, the old Cat road, Cat fire trail, the pit Cat road, fire boundary, landing debris boundary, the No. 1 spar tree stump, area of unburned reproduction, the burned area, the gravelp it and the landing. The scale of the map is 1" equals 30'. Contours are shown at intervals of 5 feet.				
114	Vanorsdel map enttiled "Vicinity Map of Landing No. 2." Field surveys made by R. W. Ensley and G. E. Lahti; prepared under the direction of John P. Vanorsdel on March 26-30, 1953, and May 11-15, 1953. This map shows truck roads,	III- 976	III- 976		III- 976

Exhibit No.	Description	Identified	Offered	Rejected	Received
	Cat fire trail, old Cat road, burned area, debris boundary and landing. The is scaled to 1" equals 3' and shows contours at intervals of 5 feet.				
115		X-3263	X-3263		X-3264
116		III- 815	III- 815		III- 815
117		III- 977	III- 977		III- 977
118		II- 685 II- 688	II- 690		II- 690
119		II- 689	II- 690		II- 690
120		II- 686 II- 689	II- 690		II- 690
121		II- 686 II- 689	II- 690		II- 690
122		II- 686 II- 689	II- 690		II- 690
123		II- 686	II- 690		II- 690
124		II- 686 II- 689	II- 690		II- 690

Exhibit No.		Description	Identified	Offered	Rejected	Received
	124		II- 686 II- 689	II- 690		II- 690
	125	Same as No. 46			X-3266	
	126	Same as No. 45			X-3266	
Ray.	127	An aerial photo-mosaic produced by Carl M. Berry, South Administration Building, Box 38, Boeing Field, Seattle 8, Washington, showing the entire Forks Fire burn area. (Admitted in evidence as Plaintiff's Exbibit "C" on February 27, 1954.)	III- 799	III- 800		III- 800
Ray.	128	An aerial photo-mosaic of the 1600-acre area dated October 7, 1951, produced by Carl M. Berry, South Administration Building, Box 38, Boeing Field, Seattle 8, Washington,	III- 798	III- 799		III- 799

Exhibit No.	Description	Identified	Offered	Rejected	Received
	identified on its reverse side by Reorder No. M-53-21. (Admitted as plaintiff's Exhibit "D" on February 27, 1954.)				
Ray. 129	An aerial photo-mosaic entitled "Calawah Fire Area," produced by Carl M. Berry, South Administration Building, Box 38, Boeing Field, Seattle 8, Washington, from aerial photography flown November 1946 by Delano Aerial Surveys of Portland, Oregon.	III- 965	III- 966		III- 966
Ray. 130	A Carl Berry Photo-mosaic of the PAW right of way and of Highway 101 in the vicinity of the point of origin of the fire on August 6, 1957, identified on the reverse side by Reorder No. C-57-9.	II- 449	II- 449		II- 449
Ray. 131	A Carl Berry aerial photo-	III-1031	III-1032		III-1032

Exhibit No.	Description	Identified	Offered	Rejected	Received
Ray. 131	A Carl Berry aerial photo-mosaic of the PAW right of way and of Highway 101 in the vicinity of the point of origin of the fire on August 6, 1951, identified on its reverse side by Reorder No. C-57-9.	III-1031	III-1032		III-1032
Ray. 132	A Carl Berry aerial photo-mosaic of the PAW right of way and of Highway 101 in the vicinity of the point of origin of the fire on August 6, 1951, identified on its reverse side by Reorder No. C-57-9. Rayonier has multiple copies of this aerial photo-mosaic and proposes to use one of said copies for each witness who may find it appropriate to mark locations of hte fire and	I- 206	I- 207		I- 207

Exhibit No.	Description	Identified	Offered	Rejected	Received
	the fire lines, etc. at various times.				
Ray. 132-A	Carl Berry aerial photo-mosiac of the PAW right of way and of Highway 101 in the vicinity of the point of origin of the fire on August 6, 1951, identified on its reverse side by re-order No. C-57-9. This photograph bears date of October 7, 1951 and is of the scale of 1 inch equals 400 feet. Mr. Floe has marked this photograph so as to show the 1938 fire, the Rifle Fire of June-July 1951 and the 1600-acre fire.	II- 451	II- 475		II- 475
Ray. 133	A Carl Berry aerial photo-mosaic of the so-called 60-acre area, scale 1"		N.O.		

Exhibit No.	Description	Identified	Offered	Rejected	Received
	equals 200'. Identified on its reserve side by re-order No. C-57-9.				
Ray. 134	General map of the Forks Fire burn area and vicinity, bearing initials "J.E.F." and dated June 30, 1953, showing outline of the burn area, location of Snider Ranger Station and other sites referred to in the pretrial order, the location of Raynoier's fee lands and the type of timber thereon, status of clearance, location of felled and bucked timber, etc.	VI-1886	VI-1887 XIII-4305		VI-1888 XIII-4306
Ray. 135	Reproduction Survey map 1948 and 1950, showing species, age, stocking and acreage of so much of	XIII-4305 XIV-4596	XIII-4305 XIV-4596		XIII-4306 XIV-4597

Exhibit No.	Description	Identified	Offered	Rejected	Received
	Rayonier's lands identified in Rayonier's Exhibit 50 as are located in Township 29 North, Range 13 West, W. M.				
Ray. 136	Reproduction Survey map 1948 and 1950, showing species, age, stocking and acreage of so much of Rayonier's lands identified in Rayonier's Exhibit 50 as are located in Township 29 North, Range 12 West, W.M.	XIII-4305 XIV-4568	XIII-4305 XIV-4596		XIII-4306 XIV-4597
Ray. 137	Reproduction Survey map 1948 and 1950, showing species, age, stocking and acreage of so much of Rayonier's lands identified in Rayonier's Exhibit 50 as are located in Township 29 North, Range 11 West, W.M.	XIII-4305 XIV-4568	XIII-4305 XIV-4596		XIII-4306 XIV-4597

North, Range 11 West, W.M.

Exhibit No.	Description	Identified	Offered	Rejected	Received
Ray. 138	Reproduction Survey map 1948 and 1950, showing species, age, stocking and acreage of so much of Rayonier's lands identified in Rayonier's Exhibit 50 as are located in Township 28 North, Range 13 West, W.M.	XIII-4305 XIV-4596	XIII-4305 XIV-4596		XIII-4306 XIV-4597
Ray. 139			N.O.		
Ray. 140		III- 788	III- 788		III- 788
Ray. 141		X-3267	X-3267		X-3267
Ray. 142	Damages		N.O.		
Ray. 143-A) -B) -C)		XIII-4316	XIII-4316		XIII-4317
Ray. 144	Damages		N.O.		
Ray. 145	Damages		N.O.		
146		I- 175	I- 178		I- 178
147		II- 428	II- 428		

Exhibit No.	Description	Identified	Offered	Rejected	Received
148	Government's slash map of the burn area corrected to show changes requested by other parties.	II- 487	III- 977		III- 979
149	A map of portions of the Northwest Quarter of the Southeast Quarter and the Northeast Quarter of the Southwest Quarter of Section 29, Township 30 North, Range 10 West, showing standing and down forest materials purporting to be similar to the fuel types at the toe of Camp Creek ridge in the 60-arce area. This map made in October 1957.	III- 836 IV-1297	III- 839 IV-1297		IV-1298
149-A		III- 836 IV-1297	III- 839 III- 844 IV-1297		IV-1298
150		III- 778	III- 778		III- 778

Exhibit No.	Description	Identified	Offered	Rejected	Received
151		III- 783	III- 784		
152		XIV-4617	XIV-4617		XIV-4617
153		III- 789 III- 790 XIV-4618	III- 789 XIV-4617		III- 879
154	Damages		N.O.		
155			N.O.		
156		X-3268	X-3268	X-3268	
157		X-3268	X-3268	X-3268	
158		IV-1082	IV-1082 IV-1083		IV-1083
159	Very large brown paper map entitled "P.A.W. Fire, 1951," showing Township 30 North, Range 10 West of the Willamette Meridian and purporting to identify by symbols and colored lines the location of and the characteristics of the fire		N.O.		

Exhibit No.	Description	Identified	Offered	Rejected	Received
	lines within the above-described township.				
160	Very large brown paper map entitled "P.A.W. Fire, 1951," showing a large portion of the area within the Forest Service Protective Area which was burned on and after September 20, 1951, and purporting to identify by symbols and colored lines the location of and the characteristics of the fire lines within trat area.		N.O.		
161			N.O.		
162		V-1459	V-1460		V-1460
163		IV-1301	IV-1302		IV-1303
164		V-1573	V-1573		V-1574
165		V-1678	V-1678		V-1679

Exhibit No. Description

Exhibit No.	Description	Identified	Offered	Rejected	Received
166		V-1682	V-1683		V-1683
167		X-3269	X-3269		X-3269
168		VII-2178	VII-2179		VII-2180
		X-3269	X-3269		X-3269
168-A		VII-2178	VII-2179		VII-2180
		X-3269	X-3269		X-3269
169		X-3269	X-2174		X-3279
170		X-3270	X-3269		
170-A	(See X-3274-80)			X-3280	
171		VII-2251	VII-2257		VII-2257
172		X-3108	X-3108	X-3109	
173		X-3350	X-3350		X-3350
174		X-3350	X-3350		X-3350
175		X-3372	X-3372		X-3372
176		X-3388	X-3388		X-3389
177		XI-3562	XI-3562		XI-3563
			XII-3742		XII-3743

Exhibit No.	Description	Identified	Offered	Rejected	Received
178-A	Simpson LoggingCompany calendar. (A scene on Simpson's logging railroad in South Olympic Mountain area, Grays Harbor County.	XII-3746 XII-3747	XII-3745 XII-3803-4		XII-3804
178-B		XII-3746- XII-3747	XII-3745 XII-3806		XII-3806
178-C		XII-3746- XII-3747	XII-3745 XII-3806		XII-3806
179		XIV-4428	XIV-4428		XIV-4428
180		XIV-4562	XIV-4563		XIV-4563
181		XIV-4595	XIV-4596		XIV-4595
182		XIV-4563	XIV-4564		XIV-4565

PAW EXHIBITS

	Transcript Offered		Transcript Received	
1	I	131	I	131
	I	171	I	171
2	I	168	I	168
3	I	202	I	202
4	I	202	I	202
5	I	67	I	67
7	I	171	I	171
8	I	171	I	171
9	XIV	4598	XIV	4598
10	XIV	4598	XIV	4598
11	XIV	4599	XIV	4599

FIBREBOARD EXHIBITS

		Transcript Offered		Transcript Received	
1		II	484	II	484
2		VI	2014	VI	2014
3		X	3273	X	3274
4		XIV	4428	XIV	4429
5		X	3274	X	3274
6		VII	2287	VII	2287
7	REJECTED	X	3295	X	3296
	—	XIV	4536	XIV	4536
8		XIV	4489	XIV	4490